DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-337
Title: Wanda Krupski, Petitioner
v.
Costa Crociere, S.p.A.
Docketed: September 17, 2009
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (08-16569)
Decision Date: June 22, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 15 2009	Petition for a writ of certiorari filed. (Response due October 19, 2009)
Oct 14 2009	Waiver of right of respondent Costa Crociere, S.p.A. to respond filed.
Oct 21 2009	DISTRIBUTED for Conference of November 6, 2009.
Oct 23 2009	Response Requested . (Due November 23, 2009)
Nov 17 2009	Order extending time to file response to petition to and including December 23, 2009.
Dec 18 2009	Brief of respondent Costa Crociere, S.p.A. in opposition filed.
Dec 30 2009	DISTRIBUTED for Conference of January 15, 2010.
Jan 15 2010	Petition GRANTED. The brief of petitioner is to be filed on or before Thursday, February 25, 2010. The brief of respondent is to be filed on or before Thursday, March 25, 2010. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 16 2010	SET FOR ARGUMENT ON Wednesday, April 21, 2010.
Feb 24 2010	Brief of petitioner Wanda Krupski filed.
Feb 24 2010	Joint appendix filed. (Statement of costs received)
Mar 5 2010	CIRCULATED.
Mar 25 2010	Brief of respondent Costa Crociere, S.p.A. filed. (Distributed)
Apr 8 2010	Reply of petitioner Wanda Krupski filed. (Distributed)
Apr 21 2010	Argued. For petitioner: Mark R. Bendure, Detroit, Mich. For respondent: Robert S. Glazier, Miami, Fla.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

09-337 SEP 15 2009

OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

WANDA KRUPSKI, a single person,
Petitioner,

v.

COSTA CROCIERE, S.p.A., a foreign corporation (Italy),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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September 15, 2009

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QUESTION PRESENTED

Fed. R. Civ. P. 15(c)(1)(C) Permits An Amended Complaint To "Relate Back", For Limitation Purposes, When The Amendment Corrects A, "Mistake Concerning The Proper Party's Identity". Other Circuit Courts of Appeal Construe The Rule As Applying To Substitution Of The Correct Defendant For A Related Corporation With A Similar Name. The Eleventh Circuit Has Concluded That There Can Be No Such "Mistake" Where The Plaintiff Had Imputed Knowledge Of The Identity Of The Added Defendant Prior To Filing Suit. Does The Eleventh Circuit Construction Of Rule 15(c)(1)(C) Undermine The Purpose Of The Rule And Is It Inconsistent With The Decisions In Other Circuits?

PARTIES TO THE PROCEEDINGS

Petitioner Wanda Krupski is a Michigan resident who booked a cruise aboard the Costa Magica through a South Carolina-based travel agent. The Costa Magica departed from Florida on February 18, 2007. Three days later, while at sea, Ms. Krupski fractured her femur when she tripped over a camera cable. Petitioner filed the personal injury suit which gives rise to this Petition.

Respondent Costa Crociere S.p.A. ("Costa Crociere"), the owner and operator of the Costa Magica, is an Italian corporation. It sold the cruise ticket to Petitioner through Costa Cruise Lines N.V. LLC ("Costa Cruise"), its affiliate based in Hollywood, Florida. Petitioner initially filed suit against Costa Cruise. She later filed an Amended Complaint against Costa Crociere. As defendant in the underlying personal injury suit, Costa Crociere is Respondent in this Court.

CORPORATE DISCLOSURE STATEMENT

BENDURE & THOMAS is a partnership comprised of MARK R. BENDURE and MARC E. THOMAS, with no parent corporation and is not a publicly held corporation.

CERTIFICATE OF INTERESTED PARTIES

Petitioner certifies that the following is a complete list of attorneys, persons, associated persons, firms, partnerships or corporations that have a financial interest in the outcome of this case, including heirs, executors, administrators, agents and assigns that have a financial interest in the outcome of this case, and other identifiable legal entities related to a party:

(A) Krupski, Wanda - Petitioner

(B) Bendure & Thomas

(C) Bendure, Mark R. - Appellate Counsel for Petitioner

(D) Berlowitz, Jeffrey S. - Counsel for Petitioner

(E) Phillips, Canton & Berlowitz, P.A.

(F) Turner & Turner, P.C.

(G) Turner, Matthew L. - Counsel for Petitioner

(H) Carnival Corporation (CCL)

(I) Costa Crociere, S.p.A.

(J) Costa Cruceros S.A.

(K) Costa Cruceros S.L.

(L) Costa Cruise Lines, N.V.

(M) Costa Cruise Lines UK Ltd.

(N) Costa Cruzerios Agencia Maritima E Turismo Ltd.

(O) Costa Finance, S.A.

(P) Costa Holding Srl

(Q) Costa International B.V.

(R) Costa Kruesfahrten Gmbh

(S) Horr, Davis J. - Counsel for Appellee

(T) Horr, Novak & Skipp, P.A.

(U) International Risk Services, Inc.

(V) Scarry, Brian T. - Counsel for Respondent

(W) Turnoff, The Honorable William C. - L.T. Magistrate

(X) Wylie, Stephanie H. - Counsel for Respondent

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OPINIONS AND ORDERS BELOW

Suit was filed in the United States District Court for the Southern District of Florida, Miami Division (# 08-60152-CIV). On October 21, 2008, Hon. Cecilia M. Altonaga, United States District Judge, issued her summary judgment Order (DE 50,[1] 8a-22a). In substance, she held that Petitioner's identification of Costa Cruise, but not Costa Crociere, in the initial Complaint did not constitute a "mistake concerning the proper party's identity" within the meaning of Fed. R. Civ. P. 15(c)(1)(C)(ii). Therefore, she ruled, the Amended Complaint did not "relate back" and the claim against Costa Crociere was time-barred by the one-year limitation period found in the ticket. The District Court Order is unpublished.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit (#08-16569-JJ). By Opinion of June 22, 2009 (1a-7a), the Court of Appeals affirmed (Hon. Ed Carnes, Hon. Charles R. Wilson, Hon. Peter T. Fay). That Opinion is available online, but is otherwise unpublished.

SUPREME COURT JURISDICTION

This suit was brought by Wanda Krupski, an American citizen, against Costa Crociere, an Italian corporation. Ms. Krupski sought recovery for injuries sustained on a cruise ship in international waters. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1333(1).

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[1] Designations beginning "DE" identify the docket entry number of the District Court filing referred to.

On October 28, 2008, Hon. Cecilia M. Altonaga, United States District Court Judge for the Southern District of Florida, Miami Division, issued a Final Judgment. Petitioner filed her Notice of Appeal on November 17, 2008. She invoked the jurisdiction of the United States Court of Appeals for the Eleventh Circuit under 28 U.S.C. § 1291.

The Court of Appeals issued its Opinion and Judgment on June 22, 2009. Petitioner relies on the jurisdiction conferred on this Court by 28 U.S.C. § 1254(1), "Cases in the court of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

This Petition, filed within 90 days of the Court of Appeals Judgment, is timely under this Court's Rule 13.1.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

This appeal turns on the interpretation and application of Fed. R. Civ. P. 15(c)(1), which states, in full:

> **"Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when:
>
> (A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - - or attempted to be set out - - in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

STATEMENT OF THE CASE

In May of 2006, Ms. Krupski, a Michigan resident, purchased passage on the cruise vessel, Costa Magica, through a travel agent in South Carolina. In January of 2007, the travel agent received "Travel Documents", on which the second page stated (DE 26, Ex. 1; 25a):

"**Costa Cruise Lines N.V.**
200 South Park Road,
Suite 200
Hollywood, FL 33021-8541"

The Travel Documents were sent by Costa Cruise.

Plaintiff also received an eleven page Passenger Ticket (DE 6-2; 27a-37a). The Ticket required suit to be filed within one year (28a). The term "CARRIER" was defined to include Respondent Costa Crociere, various agents onboard the vessel, and the manufacturer (27a). According to documents filed by Plaintiff in the District Court, there are numerous "Costa" corporations (DE 26, Ex. 2, 3).

The ship departed from Port Everglades, Florida on February 18, 2007. Three days later, on February 21, 2007, Plaintiff was injured, falling in the ship's theater. She apparently tripped over a camera cable left near her chair, suffering a fractured right femur.

By letter of July 2, 2007, Plaintiff's counsel wrote to Costa Cruise in Hollywood, Florida, providing notice of the injury. In response, counsel received a letter from the Claims Administrator for Costa Cruise (DE 26, Ex. 6; 24a) seeking additional information, "[i]n order to facilitate our future attempts to achieve a pre-litigation settlement".

When settlement could not be reached, suit was filed against Costa Cruise on February 1, 2008, in the United States District Court for the Southern District of Florida, with jurisdiction predicated on 28 U.S.C. § 1332, 28 U.S.C. §1333(1) and 28 U.S. C. § 1333. The Complaint was served three days later on CT Corporation System, the Registered Agent for Costa Cruise. On February 25, 2008 (one year and four days after the injury), Costa Cruise filed its Answer, through its counsel, the Horr, Novak & Skipp law firm. At the end of its Answer, Costa Cruise alleged that it

was a sales and marketing agent for the carrier/vessel operator, Respondent Costa Crociere.

Eventually, Orders were entered allowing the filing of an Amended Complaint and dismissing the suit against Costa Cruise. Accordingly, Plaintiff filed an Amended Complaint against Respondent Costa Crociere on July 11, 2008, which was served, via the Hague Convention, on August 21, 2008.

Respondent Costa Crociere filed its Motion to Dismiss on September 3, 2008, represented by the same law firm as Costa Cruise. In substance, it alleged that it had been sued after the one year period set forth in the Passenger Ticket, and that the Amended Complaint did not "relate back" under Fed. R. Civ. P. 15(c)(1)(C).

Plaintiff filed her Response to the Motion to Dismiss, arguing that "relation back" was appropriate. Plaintiff explained the mistake in suing Costa Cruise, rather than Respondent, initially: the second page of the Travel Document (25a) listed Costa Cruise; that document was sent by Costa Cruise; the website listed Costa Cruise as the only active entity with a United States office; Costa Cruise was the only such active entity registered with the Florida Division of Corporations; and the pre-suit response of the claims adjustor led counsel to believe that Costa Cruise was the responsible entity.

It was agreed that the criterion of Rule 15(c)(1)(B) ("ari[sing] out of the conduct, transaction, or occurrence set out . . . in the original pleading") was satisfied. The dispute focused on the criteria of Rule 15(c)(1)(C)(i) ("[the added party] received such notice

of the action that it will not be prejudiced in defending on the merits") and 15(c)(1)(C)(ii) ("[the added party] knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity").

On October 21, 2008, Judge Altonaga issued her Order (DE 50; 8a-22a). In her opinion, Respondent received timely constructive notice due to its sufficient "identity of interest" with Costa Cruise and their shared counsel (14a-17a). However, relying on and citing the Answer filed by Costa Cruise after expiration of the one year period, the District Court concluded that there was no "mistake" in failing to name Respondent Costa Crociere earlier (19a-20a). Accordingly, she granted the Motion to Dismiss (construed as a Motion for Summary Judgment) (21a). A Final Judgment was entered on October 28, 2008, and Petitioner filed a timely Notice of Appeal.

On appeal, the Court of Appeals for the Eleventh Circuit affirmed without oral argument (1a-7a). Its principal rationale was that Respondent was identified as "carrier" on page one of the eleven page Passenger Ticket (6a), thus, "The identity and knowledge of Costa Crociere as a potential party [before filing suit] must be imputed to Krupski and her counsel" (6a), and the identification of Costa Cruise, instead of Respondent, in the original suit, was therefore a "deliberate decision" rather than a "mistake" (5a-6a). Additionally, the Court noted the delay in filing the Amended Complaint as a further reason why Rule 15(c) was inapplicable, "even assuming that she first learned of Costa Crociere's identity as the correct party from Costa Cruise's Answer (filed on February 25, 2008)" (7a).

Petitioner now seeks Supreme Court review. She submits that the Eleventh Circuit construction and application of Rule 15(c) and its "mistake" criterion clash with the approach of other Circuits.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

Fed. R. Civ. P. 15(c)(1)(C) Permits An Amended Complaint To "Relate Back", For Limitation Purposes, When The Amendment Corrects A, "Mistake Concerning The Proper Party's Identity". Other Circuit Courts of Appeal Construe The Rule As Applying To Substitution Of The Correct Defendant For A Related Corporation With A Similar Name. The Eleventh Circuit Has Concluded That There Can Be No Such "Mistake" Where The Plaintiff Had Imputed Knowledge Of The Identity Of The Added Defendant Prior To Filing Suit. The Eleventh Circuit Construction Of Rule 15(c)(1)(C) Undermines The Purpose Of The Rule And Is Inconsistent With The Decisions In Other Circuits

The Federal Rules of Civil Procedure are the principal blueprint for the administration of justice in the courts of the United States. They are a national compendium, designed for uniform application across the Nation. The decision of the Eleventh Circuit creates an "imputed knowledge" exception which is inconsistent with the language and purpose of Fed. R. Civ. P. 15(c)(1)(C), and is in conflict with the approach of other Circuits. This Court should review the

aberrant decision to assure the evenhanded application of the Rule throughout the Country.

A. The Critical Issue: The Meaning Of The Phrase, "Mistake Concerning The Proper Party's Identity"

Whether Petitioner's case is summarily dismissed, or whether she may obtain an outcome based on the substantive merits of her personal injury action, turns on Fed. R. Civ. P. 15(c) which states in pertinent part, and with the language at issue emphasized:

> "**An amendment to a pleading relates back to the date of the original pleading** when:
>
> * * *
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - - or attempted to be set out - - in the original pleading; or
>
> (C) **the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and com-plaint, the party to be brought in by amendment:**
>
> (i) received such notice of the action that it will not be prejudiced in the defending on the merits; and
>
> (ii)**knew or should have known that the action would have**

been brought against it, but for a mistake concerning the proper party's identity."

As the District Court correctly noted (14a), there are three criteria for "relation back" of an amendment changing the name of, or adding a new, defendant. *Makro Capital of Am., Inc. v. UBS, AG*, 543 F.3d 1254, 1258 (11th Cir. 2008); *Goldman v PraxAir, Inc.*, 494 F.3d 458, 468 (4th Cir., *en banc*, 2007). First, the amendment must assert a claim arising out of the same transaction [Rule 15(c)(1)(B),(C)]. As the parties, District Court and Court of Appeals agree, the Amended Complaint asserts the same essential claim as the original Complaint; only the name of the Defendant is changed - - from Costa Cruise to Costa Crociere.

Secondly, within 120 days after expiration of the limitation period ["within the period provided by Rule 4(m) for serving the summons and complaint"], the added defendant must have, "received such notice of the action that it will not be prejudiced in defending on the merits" [Rule 15(c)(1)(C)(i)].[2] Here, Costa Cruise was served well within the "one year plus 120 day" deadline. Within that period, the claims adjuster was

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[2] An earlier version of Rule 15 was interpreted as requiring notice to an **added** defendant within the **limitation period itself**. *Schavione v. Fortune*, 477 U.S. 21 (1986). This led to the anomalous result that, for an added defendant, the plaintiff was given **less** time to provide notice than for the initial defendant. Criticism of *Schavione* led to the 1991 amendment to Rule 15 to its current form, "within the time provided by Rule 4(m) for service of the summons and complaint . . ." *Hill v. United States Postal Service*, 961 F.2d 153, 155 (11th Cir. 1992).

notified of the claim, the suit was filed, and served, and its counsel - - who later represented Respondent - - had filed an Answer. The District Court had no difficulty concluding that Respondent Costa Crociere likewise had timely notice and would suffer no prejudice (14a-18a).

The third, and critical, requirement is that the added Defendant, Respondent, must have, "kn[own] or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity". The meaning of the phrase, "mistake concerning the proper party's identity", in Rule 15(c) frames the issue.

More particularly, this case presents the issue of what constitutes a "mistake concerning the proper party's identity" which, when corrected, "relates back" for limitation purposes. Here, the "mistake", as explained by Petitioner's counsel,[3] was an initial misunderstanding over which of the many "Costa" entities was the name of the ship operator responsible for Ms. Krupski's injuries. On the basis of the designation of Costa Cruise in the travel documents (25a), the name on the letter from the claim representative (24a), and his determination that Costa Cruise was the name of the only entity registered in Florida, where the voyage began, he concluded that

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[3] There was no evidentiary hearing or similar proceeding in the trial court. The only explanation of record is that found in the Responses filed by Petitioner in the District Court in response to Summary Judgment or dismissal motions (DE 26, DE 47).

Costa Cruise was the name of the "proper party".[4] Whether that is a "mistake concerning the proper party's identity" within the meaning of the Rule, or whether the "imputed knowledge" of Respondent's identity (because named as the "carrier" on one page of the eleven page Passenger Ticket), is what this case is all about.

B. The Circuit Courts of Appeal Are Divided On The Meaning And Application Of The Term, "Mistake Concerning The Proper Party's Identity"

On a broader level, the decision below underscores the differences between the Circuits in interpreting the critical phrase. As a result, the same Federal Rule of Civil Procedure means something different in Florida than what it means in California, New York, or Ohio. The ability to maintain a cause of action depends on the vagaries of where suit is filed.

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[4] The original Complaint sued Costa Cruise in the belief that it was the "Costa" entity which operated the Costa Magica and owed the legal duties arising from the status of cruise ship operator. Plaintiff sued Costa Cruise in the belief that the Costa Magica was "Defendant's vessel" (DE 1, Complaint, ¶ 6). She alleged that Costa Cruise "owned and operated" the vessel (DE 1, Complaint, ¶ 10). The suit alleged that Costa Cruise was the invitor with the premises liability obligations arising from that role (DE 1, Complaint, ¶ 14). The Complaint alleged that Costa Cruise was negligent in its capacity as vessel operator (DE 1, Complaint, ¶¶ 15, 16, 17, 18). Plainly Plaintiff sought to sue the operator of the Costa Magica and believed Costa Cruise was the name of the "Costa" entity which had that status.

Rule 15(c) is a part of a compilation of Federal Rules of Civil Procedure, the very first of which [Fed. R. Civ. P. 1] expresses the overriding philosophy:

> "These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

The overriding commitment to an outcome based on the substantive merits is expressed in the "relation back" provisions of Rule 15. The Rule is to be liberally construed to avoid the undue forfeiture of meritorious claims. *Woods v. Indiana Univ.*, 996 F.2d 880, 883 (7th Cir. 1993). In the specific context of amendments adding a new party, Rule 15(c)(1)(C) permits amendments after the limitation period, so long as the purpose behind limitation statutes is preserved. *Goldman, supra.*

It is a truism of modern business that enterprises are often conducted by a number of related corporations, often sharing very similar names, performing discrete functions, as part of a consolidated business activity. Whether to confuse creditors, limit liability, or for other reasons, the decision to conduct business in this fashion leads to the likelihood of error by a claimant in identifying the correct defendant from among several sound-alike companies. The situation is rife with the risk of misidentification. It is also a prime reason for the liberality of amendment under Rule 15, lest businesses avoid liability through a corporate name game.

The use of multiple names seems commonplace in the maritime industry. The application of Rule 15 "relation back" to vessel operators is illustrated by

Suppa v. Costa Crociere S.p.A., No. 07-60256-CV, 2007 WL 4287508; 2007 U.S. Dist. LEXIS 89165 (S.D. Fla. Dec. 4, 2007) (DE 47, Response to Motion to Dismiss, Ex. 6), where, as here, the original suit was against Costa Cruise and the amended suit against Costa Crociere, and *Korn v. Royal Carribean Cruise Line, Inc.*, 724 F.2d 1397 (9th Cir. 1984). In both cases, the Court held that an amended suit against the cruise ship operator related back to the earlier suit against a related, similarly named, sales agent. The same result was reached in *GF Company v. Pan Ocean Shipping Co. Ltd.*, 23 F.3d 1498 (9th Cir. 1994), a suit initially brought against the agent for a shipping company and amended to add the shipping company itself.

The plain language of the Rule simply requires "a mistake concerning the proper party's identity". It does not limit the kinds of "mistakes" which can result in mis-identification. So long as there is in fact "a mistake concerning the proper party's identity" - - whatever the nature of the "mistake" - - that precondition to relation back is satisfied. The text of the Rule does not support the "imputed knowledge" rationale of the Eleventh Circuit.

At its core, "a mistake concerning the proper party's identity" occurs through misnomer, as when the initial Complaint contains a technical mis-identification of the defendant's name, or names the incorrect one of similar sounding related entities. *Golden v. PraxAir, Inc., supra; Korn, supra; Roberts v. Michaels*, 219 F.3d 775, 778 (8th Cir. 2000).

However, in view of the breadth of the unlimited term, "mistake", the treatise authorities and sister Circuits recognize that the term is to be defined and

applied broadly, and liberally. While the term "mistake" does not apply to a conscious and deliberate choice not to sue a party initially, it is to be applied to various types of "mistake". As explained in 3-15 Moore's Federal Practice - Civil § 15.19[d]:

> "The classic example of mistake is misnomer; that is, when a plaintiff misnames or misidentifies a party in its pleadings but correctly serves that party. In these cases, relation back is appropriate because the defendant is already before the court. For example, a court may find misnomer when the proper corporate name is not easily attainable and the name used is close enough to the correct corporate name for the newly-named defendant to know that it was being sued. Misnomer may also apply, for example, when a plaintiff names a corporation instead of a partnership, a parent corporation instead of a subsidiary, a building instead of its corporate owner, or a corporation in liquidation instead of its successor. In some cases a legal mistake can lead to misnomer, as when a plaintiff names an institutional defendant because of confusion as to whether an individual or an institutional defendant is the proper party, but the individual is properly served and, therefore has notice of the mistake.
>
> In contrast, a conscious choice to sue one party and not another does not constitute a mistake and is not a basis for relation back. This result is also justified on the ground that, when the plaintiff sues one possible defendant but not another, the second defendant has no reason to believe that it was an intended party or, in

other words, the second defendant does not possess actual or constructive knowledge that the action would have been brought against it, 'but for a mistake concerning the proper party's identity.' "

* * *

"The First Circuit distinguished a prior precedent in which it had found that there was no mistake in identity when the plaintiff 'merely lacked knowledge of the proper party,' noting that in the earlier case the plaintiff sued the wrong party because of an erroneous theory of liability, not because of any mistake as to the identity of the defendant. District courts in other circuits have followed the First Circuit's approach and have taken the view that a lack of knowledge of the proper defendant may constitute a 'mistake' under Rule 15(c)(1)(C)(ii) even if the lack of knowledge results from an absence of diligence.

The Fourth Circuit has also taken a broad view of the 'mistake' requirement, reversing when the district court focused unnecessarily on the type of mistake rather than on the relevant considerations - - whether the new party received notice and whether the new party would be prejudiced if relation back were allowed. The type of mistake, in this view, is relevant to the extent it explains the type of notice the new party had.

The courts that take a broad view of the mistake requirement have the better-reasoned

> approach. A court should not limit its findings to mistake merely to cases of misnomer. Rather it should consider whether the new party knew that the failure to include it in the original complaint was an error rather than a deliberate strategy. While courts have focused on the mistake requirement in determining whether an amendment relates back, the more important considerations are (1) whether the new party received sufficient notice of the action to avoid prejudice, and (2) whether the new party knew or should have know that it was an intended party." (footnotes omitted).

The case law from other Circuits has likewise viewed the term "mistake" as excluding an initial conscious choice not to sue, but broadly covering a variety of actual "mistakes". *Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000) (error in identifying the operator of the vehicle); *Goldman v. PraxAir, Inc*, 494 F.3d at 470 (change in name of defendant) ("the text of Rule 15(c)(3) does not support . . . parsing of the 'mistake' language"); *Roberts, supra* ("the principle [of relation back] has been applied more broadly [than classic misnomer]"); *Taliferro v. Costello,* 467 F.Supp. 33 (E.D. Pa., 1979); *Koal Indus. Corp. v. Ashland S.A.*, 808 F.Supp. 1143 (S.D. N.Y. 1992).

In this case, the courts below have posited that prior knowledge of the existence of the added Defendant necessarily shows the lack of "mistake". The **actual** principle is that a **deliberate choice** not to sue is not a "mistake", and the failure to add the new defendant within the initial limitation period, despite knowledge of its identity and role **during the**

limitation period,[5] is **circumstantial evidence** that the failure to sue within the limitation period was a conscious choice rather than a "mistake". *Kilkenny v. Arco Marine, Inc.*, 800 F.3d 853, 856-857 (9th Cir. 1986); *Keller v. United States*, 667 F.Supp. 1351, 1357 (S.D. Cal. 1987).

Under the approach of other Circuits, the naming of Costa Cruise, rather than Respondent Costa Crociere, in the initial Complaint was a "mistake" within the meaning of the Rule, not a deliberate choice to forego suit against it. There is no conceivable "tactical" benefit to foregoing suit against the vessel operator. It was simply a mistake in determining the name of the "Costa" entity which operated the Costa Magica. The initial Complaint reflects Petitioner's intent to sue the Costa operator of the Costa Magica. She was simply mistaken as to the name of that entity. As the cases from other Circuits make clear, where the Complaint manifests a desire to sue the entity occupying a certain status, a mistake as to the name of the company occupying that status is a "mistake" for which "relation back" is allowed by Rule 15. *Korn* (mistake as to the operator of a cruise ship); *GF Co. v.*

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[5] The District Court relied on the "knowledge" obtained by Petitioner from the Answer filed by Costa Cruise **after the limitation period had already expired**. The lapse in logic which occurs when **post-suit** information is considered to provide **pre-suit knowledge** was addressed in *Leonard* (219 F.3d at 29):

> ". . . [K]nowledge acquired by a plaintiff after filing his original complaint is without weight in determining his state of mind at the time he filed the initial complaint and, thus, in determining whether a mistake concerning identity occurred."

Pan Ocean Shipping Co., 23 F.3d 1498, 1503-1504 (9th Cir. 1994) (mistake as to the operator of a cargo vessel); *Leonard v. Parry, supra* (mistake as to the operator of an automobile); *Chumery v. U.S. Repeating Arms Co.*, 196 F.R.D. 410 (D.C. Kan. 2000) (mistake as to the name of the manufacturer); *Goldman* (intent to sue company occupying a status may be discerned from the Complaint).

The "imputed" "knowledge" analysis of the Eleventh Circuit essentially scuttled the case because Petitioner's counsel did not notice the reference to Respondent Costa Crociere as "carrier" in the Passenger Ticket. The fact that an error was made does not belie the existence of a "mistake"; it is the very essence of what a "mistake" is. As the *Leonard* Court explained (219 F.3d at 29):

> "Virtually by definition, every mistake involves an element of negligence, carelessness, or fault - - and the language of *Rule 15(c)(3)* does not distinguish among types of mistakes concerning identity. Properly construed, the rule encompasses both mistakes that were easily avoidable and those that were serendipitous. The examples assembled by the advisory committee - - e.g., the naming of a nonexistent federal agency or a retired officer, *see Fed. R. Civ. P. 15* advisory committee's note (1966 Amendment) - - confirm this construction. The drafters believed that such errors would trigger *Rule 15 (c)(3)* notwithstanding that reasonable diligence almost always would prevent them from occurring."

Even the existence of carelessness or negligence by Plaintiff or counsel does not undermine the availability of "relation back"; the issue is whether the failure to name was a "mistake" or deliberate omission, not whether the failure was blameworthy. *Centuori v. Experian Information Solutions, Inc.*, 329 F.Supp.2d 1133, 1139 (DC Ariz. 2004).

In the final analysis, the ruling below adopts an idiosyncratic view of Rule 15(c)(1)(C)'s remedial "relation back" language. That approach clashes with the view of other Circuits and the intent behind the Rule. This Court should review that aberrant approach to assure uniform treatment of a nationwide Rule.

C. The Alternative Rationale Of The Eleventh Circuit Is Untenable

The Eleventh Circuit affirmed, even "assuming that [Petitioner] first learned of Costa Crocier's identity from Costa Cruise's Answer" filed after the one year limitation period had already expired (7a). It did so because Petitioner delayed filing her Amended Complaint to name Costa Crociere after receipt of this information (7a). That alternative rationale is wholly untenable, and simply emphasizes why the Appeals Court's "mistake" analysis is outcome-determinative.

"Delay" might have been a consideration in the District Court decision whether to allow leave to amend to add Respondent as a defendant, but the Court **did** permit amendment (DE 30). By the time of amendment, the limitation period had already expired, making the Rule 15 "relation back" question critical. The "notice" feature of that Rule had **already** been

satisfied, through the initial suit against Costa Cruise, even before its Answer was filed. Just as it is illogical to consider post-suit information in assessing pre-suit knowledge (*Leonard, supra*), it is illogical to consider post-suit delay in amendment as probative of whether the failure to sue the added defendant initially was a "mistake concerning the proper party's identity".

WHEREFORE Petitioner WANDA KRUPSKI prays that this Honorable Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: September 15, 2009

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-16569
Non-Argument Calendar
D. C. Docket No. 08-60152-CV-CMA

[Filed June 22, 2009]

WANDA KRUPSKI, a single person,	)
	)
Plaintiff-Appellant,	)
	)
versus	)
	)
COSTA CRUISE LINES, N.V., LLC, d.b.a. Costa Cruise Lines, a foreign corporation (Netherland Antilles),	)
	)
Defendant,	)
	)
COSTA CROCIERE, SPA, a foreign corporation (Italy),	)
	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
for the Southern District of Florida

(June 22, 2009)

Before CARNES, WILSON and FAY, Circuit Judges.

PER CURIAM:

Wanda Krupski ("Krupski") appeals the district court's grant of summary judgment[1] in favor of Costa Crociere, S.p.A. ("Costa Crociere"), the carrier/vessel operator of a cruise ship aboard which Krupski allegedly suffered an injury. After review, we affirm.

I. BACKGROUND

In January 2007, Krupski's South Carolina-based travel agent booked a cruise for Krupski, a Michigan resident, through Costa Cruise Lines N.V., LLC ("Costa Cruise") in Hollywood, Florida. The travel agent received from Costa Cruise Krupski's "Travel Documents," which listed Costa Cruise's Florida address on the second page. Krupski also received an eleven-page passenger ticket containing "General Conditions of Passenger Ticket Contract" ("the Ticket"), which required that any suit be filed within one year of the date of any alleged injury. The term "Carrier" was defined to include Costa Crociere,

---

[1] Costa Crociere sought dismissal of the action pursuant to Rules 12(b)(6), 15, and 56, Federal Rules of Civil Procedure. Because the parties recognized and treated the motion as one for summary judgment, the district court afforded the parties the opportunity to present all material pertinent to the motion as required by Rule 12(d) and considered the motion as one for summary judgment.

various agents onboard the vessel, and the ship's manufacturer. On February 18, 2007, Krupski departed from Fort Everglades, Florida, aboard the cruise ship Costa Magica. Three days later, Krupski allegedly tripped over a camera cable in the ship's theater and suffered a fractured femur.

By letter of July 2, 2007, Krupski's counsel provided notice of the injury to Costa Cruise in Hollywood, Florida. In response, Krupski's counsel received a letter from the Claims Administrator for Costa Cruise seeking additional information for pre-suit settlement purposes. After unsuccessful pre-suit settlement efforts, Krupski sued Costa Cruise. One year and four days after Krupski's alleged injury, Costa Cruise answered, stating that it was merely the North American sales and booking agent for the carrier/vessel operator, Costa Crociere. The district court entered orders allowing Krupski to amend her complaint, adding Costa Crociere as a party and dismissing the suit against Costa Cruise. Represented by the same law firm as Costa Cruise, Costa Crociere moved to dismiss, arguing that it had been sued after the one-year period allowed for claims as set forth in the Ticket, and that the Amended Complaint did not "relate back" under Rule 15(c)(1)(C), Federal Rules of Civil Procedure. Krupski appeals the dismissal, contending that her failure to sue Costa Crociere was merely the result of "mistake" as contemplated by Rule 15(c).

II. STANDARDS OF REVIEW

We review a district court's grant of summary judgment *de novo*. *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 836 (11th Cir. 2006). We review a district

court's application of Rule 15(c) for abuse of discretion but review findings of fact necessary for application of the Rule for clear error. *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1121 (11th Cir. 2004) (citation omitted).

III. DISCUSSION

Rule 15(c) provides, in pertinent part, that an amended pleading "relates back" to the date of the original pleading when:

> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> > (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
> >
> > (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Because the parties agreed that Rule 15(c)(1)(B)'s requirement had been satisfied, the dispute focused on the criteria set forth in Rule 15(c)(1)(C)(i) and

(ii)—whether Costa Crociere "received such notice of the action that it will not be prejudiced in defending on the merits," and "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." The district court found that Costa Crociere met Rule 15(c)(1)(C)(i)'s requirement, having received timely constructive notice of the suit based on its sufficient "identity of interest" with Costa Cruise and their shared counsel. However, the district court granted Costa Crociere's motion on the basis that there was no "mistake," under the meaning of the rule, in failing to name Costa Crociere earlier.

"The purpose of Rule 15(c) is to permit amended complaints to relate back to original filings for statute of limitations purposes when the amended complaint is correcting a mistake about the identity of the defendant." *Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998) (citation omitted). However, mere lack of knowledge of the proper party is not enough. *See id.* at 1226-27. "Nothing in [Rule 15(c)] or in the [Advisory Committee] Notes indicates that the provision applies to a plaintiff who was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged." *Id.* at 1227 (internal quotations omitted). "Even the most liberal interpretation of 'mistake' cannot include a deliberate decision not to sue a party whose identity [the] plaintiff knew from the outset." *Id.* (internal quotations and citation omitted).

Using February 21, 2007 as the date of Krupski's alleged injury, Costa Crociere concedes that Krupski brought her original action against Costa Cruise within the one-year period. The determinative

question is whether Krupski's suit against Costa Cruise rather than Costa Crociere was the result of a "mistake concerning the proper party's identity" as contemplated by Rule 15(c)(1)(C). Krupski concedes that if suing Costa Cruise, and not Costa Crociere, was a deliberate choice, no "mistake" occurred and the suit against Costa Crociere is time-barred. (Reply Br. at 2). According to Krupski, numerous "Costa" corporations exist and she always intended to sue the correct party.

Krupski's core argument is that the district court based its conclusion that Costa Crociere was known to Krupski all along because of information provided by Costa Cruise in its Answer, Corporate Disclosure Statement, and Summary Judgment Motion, which conclusion was erroneous because Costa Cruise filed all of those documents after the one-year limitations period expired. Undisputed, however, is that Krupski kept her Ticket and furnished it to counsel shortly after her alleged injury. Costa Crociere, not Costa Cruise, was clearly identified in the Ticket's definition of "Carrier." The identity and knowledge of Costa Crociere as a potential party shortly after the alleged injury, therefore, must be imputed to Krupski and her counsel. Indeed, Krupski conceded before the district court that under the plain language of the Ticket, Costa Cruise could not be the Carrier. We agree with the district court that this is not a case about simple mistake of identity or misnomer—to the contrary, Krupski chose to sue one potential party and not another even though the identity of both was known to her. *See Wayne v. Jarvis*, 197 F.3d 1098, 1103 (11th Cir. 1999) (citation omitted) (Rule 15(c)'s mistake proviso is included "to resolve 'the problem of a misnamed defendant' and allow a party 'to correct a formal defect such as a misnomer or

misidentification'"), *overruled on other grounds by Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

Yet even assuming that she first learned of Costa Crociere's identity as the correct party from Costa Cruise's Answer (filed on February 25, 2008), Krupski failed to seek leave to amend her complaint until June 13, 2008 (133 days after she brought the original action) and did not file her Amended Complaint until July 11, 2008. Krupski offers no reason for this delay, and we expect she knew that the limitations period ran on February 21, 2008. Thus, even viewing the evidence in the light most favorable to her, Krupski fails to show how the district court clearly erred in its fact-finding or abused its discretion in applying Rule 15(c).

IV. CONCLUSION

For the foregoing reasons, the district court did not err in concluding that Krupski's amendment adding Costa Crociere as a party was not due to the kind of mistaken identity addressed by Rule 15(c). The judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 08-60152-CIV-ALTONAGA/Brown

[Filed October 21, 2008]

WANDA KRUPSKI,	)
	)
Plaintiff,	)
	)
vs.	)
	)
COSTA CROCIERE S.p.A.,	)
	)
Defendant.	)
	)

ORDER

THIS CAUSE came before the Court on Defendant, Costa Crociere S.p.A.'s Motion to Dismiss [D.E. 43], filed on September 3, 2008. Defendant seeks a dismissal of this action pursuant to Rules 12(b)(6), 15 and 56 of the Federal Rules of Civil Procedure. The Court has carefully considered the parties' written submissions, the record, and applicable law.

I. BACKGROUND

This maritime personal injury action arises from an injury sustained by Plaintiff, Wanda Krupski ("Krupski"), a passenger aboard the vessel Costa Magica, on February 21, 2007. (*See Complaint* [D.E. 1] at ¶¶ 11-12). On July 2, 2007, Krupski's counsel notified Costa Cruise Lines N.V., L.L.C. ("CCL N.V.") of Krupski's claims [D.E. 47-2, Ex. 1], and Krupski received a response from CCL N.V.'s Claims Administrator on July 9, 2007 [D.E. 47-2, Ex. 2]. In that letter, the Claims Administrator requested additional information from Krupski and advised her that a pre-litigation settlement might be possible. The parties, however, were unable to reach a settlement. Krupski filed this action on February 1, 2008 [D.E. 1] and served CCL N.V. on February 4, 2008 [D.E. 3, 4].

CCL N.V. served its Answer to Krupski's original Complaint on February 25, 2008 [D.E. 6], asserting that CCL N.V. does not occupy the requisite status of "carrier," and thus is not a proper defendant. CCL N.V. reasserted this argument in a Motion for Summary Judgment [D.E. 19] filed on May 6, 2008. Before the Court could rule on the Motion, the action was dismissed without prejudice [D.E. 21].

The Court re-opened the case on June 5, 2008 [D.E. 23]. Krupski added Costa Crociere S.p.A. as a Defendant on July 11, 2008 in her First Amended Complaint [D.E. 31], and the Court dismissed CCL N.V. as a party on August 20, 2008 [D.E. 42]. Subsequently, Costa Crociere S.p.A. filed the present Motion.

In the Motion to Dismiss, Defendant explains that a Passage Contract between Krupski and the carrier, Costa Crociere S.p.A., contains a one-year statute of limitations pursuant to 46 U.S.C. App. § 183-b. Utilizing February 21, 2007 as the date of injury, Costa Crociere S.p.A. concedes Krupski's original action against CCL N.V., filed on February 1, 2008, was within the one-year period. Costa Crociere S.p.A. maintains, however, that Krupski's First Amended Complaint, filed July 11, 2007, does not "relate back" to the original filing date through application of Federal Rule of Civil Procedure 15(c) and thus should be dismissed with prejudice because it is barred by the statute of limitations. Krupski objects, arguing that Plaintiff's First Amended Complaint does relate back to the original Complaint.

II. LEGAL STANDARD

A motion to dismiss a complaint for failure to state a claim requires that a court accept the facts pleaded in the complaint as true, construe them in the light most favorable to the plaintiff, and accept all reasonable inferences that can be drawn from such allegations. *See Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003); *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1534 (11th Cir. 1994); *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983). On a motion under Rule 12(b)(6), the Court limits its consideration to "well-pleaded factual allegations, documents central or referenced in the complaint, and matters judicially noticed." *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). However, "[i]f on a motion under rule 12(b)(6) . . . matters outside the pleadings are presented to and not

excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Rule 12(d), Fed. R. Civ. P. The parties have recognized and treated the present Motion as one for summary judgment (*see* [D.E. 49]), and they have had the opportunity to present all material pertinent to the Motion, as required by Rule 12(d).

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this assessment, the Court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997), and "must resolve all reasonable doubts about the facts in favor of the non-movant." *Un. of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.*, 894 F.2d 1555, 1558 (11th Cir. 1990).

"By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary

will not be counted." *Id.* at 248. Likewise, a dispute about a material fact is a "genuine" issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* However, "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 252.

"For factual issues to be considered genuine, they must have a real basis in the record . . . . [M]ere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. In those cases, there is no genuine issue of material fact "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.

III. ANALYSIS

Defendant seeks a dismissal under Rules 12(b)(6) and 56, Fed. R. Civ. P., for Plaintiff's failure to meet

the requirements of Rule 15, Fed. R. Civ. P.. "Federal Rule of Civil Procedure 15(c) governs relation back of amendments to pleadings in federal court, and provides several ways in which an amended pleading can relate back to an original pleading." *Saxton v. ACF Indus., Inc.*, 254 F.3d 959, 962 (11th Cir. 2001). Under Rule 15(c)(1),

> [a]n amendment to a pleading relates back to the date of the original pleading when:
>
> * * *
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

The parties do not dispute that Rule 15(c)(1) is the controlling provision for Plaintiff's ability to add Costa Crociere S.p.A. as a party.

Courts interpret Rule 15(c)(1) as imposing three conditions before an amended complaint relates back to the original complaint. *Makro Capital of Am., Inc. v. UBS AG*, No. 06-16162, 2008 WL 4402701, at *3 (11th Cir. Sept. 30, 2008). To ameliorate the running of the statute of limitations, all three conditions must be met for a party to successfully relate back an amended complaint that adds a defendant. The first condition – that the claim against the newly named defendant must have arisen "out of the conduct, transaction, or occurrence set out . . . in the original pleading" – is not at issue in this case. Fed. R. Civ. P. 15(c)(1)(B). The undersigned now turns to the two remaining conditions that must be satisfied for the First Amended Complaint against Costa Crociere S.p.A. to relate back to Krupski's initial Complaint against CCL N.V.

A. Sufficient Notice to Avoid Prejudice

The second requirement under Rule 15(c)(1)(C)(i) is that the defendant to be added has received sufficient notice of the action, within the 120-day time period for service and summons, to avoid prejudice. *See Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1131 (11th Cir. 2004) ("[W]hen an amendment seeks to change or add a defendant, Rule 15(c)[(1)(C)(i)] introduces considerations of both prejudice and notice."); *Kuehn v. The Cadle Co.*, No. 5:04-CV-432-OC-10GRJ, 2006 WL 845085, at *7 (M.D. Fla. Mar. 30, 2006). Rule 15(c)(1)(C)(i) does not require that the

amendment have been filed within 120 days, nor does it require formal service of process within 120 days; it only requires that the defendant have notice of the original action within 120 days sufficient to avoid prejudice. *See Freund v. Fleetwood Enters., Inc.*, 956 F.2d 354, 362-63 (1st Cir. 1992). Thus, Rule 15(c)(1)(C)(i) requires consideration of both notice and prejudice when adding a party. *See Olivares v. Doctor's Osteopathic Med. Ctr., Inc.*, No. 2:07-CV-708-FtM-29SPC, 2008 WL 3850672, at *2 (M.D. Fla. Aug. 15, 2008) (citing *Cliff*, 363 F.3d at 1131).

1. Actual and Constructive Notice

A corporation receives actual notice within the meaning of Rule 15(c)(1)(C)(i) "when its registered agent for service of process receives the complaint, even if the complaint does not identify the corporation as a party." *Goldberg v. Altsentzer* (*In re U.S. Plastic Lumber Corp.*), No. 04-33579-BKC-PGH, 2008 WL 1848790, at *4 (Bankr. S.D. Fla. Apr. 18, 2008) (citing *Peterson v. Sealed Air Corp.*, 908 F.2d 1232, 1237 (7th Cir. 1990)). It is undisputed that Costa Crociere S.p.A. did not receive actual notice of this suit within 120 days of the suit being filed. Indeed, Costa Crociere S.p.A. did not receive actual notice until July 11, 2008.

Nevertheless, "it is not necessary that the moving party demonstrate that the party to be added had actual notice of the original pleading – constructive notice can suffice under the proper circumstances." *Bagwell v. City of Atlanta*, 109 F.R.D. 290, 2[illegible]1 (N.D. Ga. 1985) (citing *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980)). Where a plaintiff chooses to rely on constructive notice to satisfy the requirements of Rule

15(c)(1)(C)(i), she can demonstrate such notice by showing the two parties – the original defendant and the defendant to be added – share some "identity of interest." *See Bowden ex rel. Bowden v. Wal-Mart Stores, Inc.*, 124 F. Supp. 2d 1228, 1242 (M.D. Ala. 2000); *see also Pompey v. Lumpkin*, 321 F. Supp. 2d 1254, 1263 (M.D. Ala. 2004). "Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other." *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998) (quoting *Kirk*, 629 F.2d at 408 n.4).

> The similarity or identity of interest theory is mainly and principally applied where the original and added parties are a parent corporation and its wholly owned subsidiary, or related corporations whose officers, directors, or shareholders are substantially identical and who have similar names or share office space, past and present forms of the same enterprise, or co-executors of an estate.

Rogatz v. Hosp. Gen. San Carlos, Inc., 89 F.R.D. 298, 300 (D.P.R. 1980) (citations omitted). Furthermore, "when the original and the added defendants are represented by the same counsel, . . . the institution of an action against one serves to provide notice of the litigation to the other." *Chumney v. U.S. Repeating Arms Co., Inc.*, 196 F.R.D. 419, 430 (M.D. Ala. 2000); *see also Jacobsen*, 133 F.3d at 320 ("[N]otice [for purposes of F.R.C.P. 15(c)] may be imputed to the new party through shared counsel.").

There is sufficient identity of interests between CCL N.V. and Costa Crociere S.p.A. that the institution of an action against one serves to provide notice of the litigation to the other. Both CCL N.V. and Costa Crociere S.p.A. are represented by the same counsel. On its website, Costa Crociere S.p.A. lists CCL N.V. as its United States office. Moreover, several managers of CCL N.V. maintain their offices at the same address listed as Costa Crociere S.p.A.'s offices in Italy.[1] Thus, because Costa Crociere S.p.A. and CCL N.V. share an identity of interest, notice to CCL N.V. can be imputed onto Costa Crociere S.p.A.

2. Unfair Prejudice

Since the effect of Rule 15(c) is to avoid the impact of the statute of limitations, the sufficiency of the notice must be evaluated in light of the policy objectives of the statute of limitations, such as to avoid undue surprise, to permit investigation and collection of evidence, and other similar considerations. These considerations are intimately related to the requirement that the notice be such that the party to be brought in will not be unfairly prejudiced in defending on the merits. "The notion of unfair prejudice turns on a newly-added defendant's ability to adequately maintain a defense against the complaint." *Kuehn*, 2006 WL 845085, at *8 (citing Fed. R. Civ. P. 15(c)(1)(C)(i)).

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[1] While Costa Crociere S.p.A. argues CCL N.V. and Costa Crociere S.p.A. do not maintain the same offices or directors, it fails to provide any documents substantiating this position.

Costa Crociere S.p.A. has not shown how it would be unfairly prejudiced if the First Amended Complaint is allowed to relate back. Costa Crociere S.p.A. has not raised any unfair prejudice arguments in its Motion to Dismiss. Given that Costa Crociere S.p.A. and CCL N.V. are closely related entities and that the claims alleged in the two pleadings are virtually identical, Costa Crociere S.p.A. would have no difficulty preparing a defense in this case if required to. *See Kuehn*, 2006 WL 845085, at *8.

B. Knowledge of the Matter Absent Mistake

The final requirement under Rule 15(c)(1)(C) is that within 120 days of the original complaint, the party to be added knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against it. Fed. R. Civ. P. 15(c)(1)(C)(ii). "The purpose of Rule 15(c) is to permit amended complaints to relate back to original filings . . . when the amended complaint is correcting a mistake about the *identity* of the defendant." *Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998) (citing *Worthington v. Wilson*, 8 F.3d 1253, 1256 (7th Cir. 1993)) (emphasis added). The word "mistake" should be read liberally, but it should not be construed to mean "lack of knowledge" concerning the correct party or a deliberate decision not to sue a party whose identity the plaintiff knew from the outset. *See Wayne v. Jarvis*, 197 F.3d 1098, 1103 (11th Cir. 1999) ("[I]gnorance does not equate to misnomer or misidentification"); *overruled on other grounds* by *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003); *see also Powers*, 148 F.3d at 1227. "Although the failure to add a defendant 'may qualify as a mistake, that is, actual inadvertence on the part of the

[amending party] and not a conscious choice or deliberate strategy to exclude the [added party],' that is not a mistake concerning the identity of the added party, as required by [Rule 15(c)(1)(C)(ii)]." *Goldberg*, 2008 WL 1848790, at *4 (quoting *In re Enron Creditors Recovery Corp.*, 370 B.R. 90, 99 (Bankr. S.D.N.Y. 2007)). Instead, "whether a plaintiff made a 'mistake,' rather than a conscious choice, in originally omitting the relevant defendant turns on whether the newly added defendant was known to the plaintiff before the running of the statute of limitations." *Chumney*, 196 F.R.D. at 429 (citing *Powers*, 148 F.3d at 1226).

Although Costa Crociere S.p.A. may have had constructive notice of this action within 120 days of the Original Complaint, Krupski's First Amended Complaint cannot relate back under Rule 15(c)(1)(C)(ii) because her failure to timely name Costa Crociere S.p.A. as a defendant was not the result of a "mistake." CCL N.V. informed Krupski that Costa Crociere S.p.A. was a proper party to the action as early as February 25, 2008. (*See Answer* [D.E. 6] at ¶ 11). Specifically, in its Answer, CCL N.V. stated:

> Pursuant to the terms of the Passage Ticket Contract, the undertaking to transport Plaintiff aboard the *Costa Magica* as carrier was by Costa Crociere S.p.A., an Italian corporation.
>
> Moreover, pursuant to Paragraph 3 of the Passage Ticket Contract, Defendant Costa Cruise Lines N.V. is clearly identified and communicated to the Plaintiff to be a sales and

> marketing agent for the carrier/vessel operator, Costa Crociere S.p.A.

(*Id.*).

On March 20, 2008, CCL N.V. listed Costa Crociere S.p.A. as an Interested Party in its Corporate Disclosure Statement [D.E. 13]. And in its Motion for Summary Judgment [D.E. 19], CCL N.V., once again, affirmed: "Costa Crociere S.p.A. is the 'Carrier' for purposes of this cause of action asserted by plaintiff. Defendant Costa Cruise Line N.V. L.L.C. does not occupy the legal status of the 'Carrier.'" Krupski, however, did not seek leave to add Costa Crociere S.p.A. as a defendant until June 13, 2008, 133 days after the Original Complaint was filed [D.E. 26]. The Court granted leave to amend the Complaint on July 2, 2008 [D.E. 30], and Costa Crociere S.p.A. was named as a defendant on July 11, 2008 [D.E. 31], 161 days after the Original Complaint was filed.

This is not a case where there was a lack of knowledge of the existence of the proper party or the identity of the proper party. Nor is this amendment sought because of a scrivener's error. *See generally Hill v. United States Postal Serv.*, 961 F.2d 153 (11th Cir.1992) (permitting *pro se* plaintiff's amended complaint to relate back when he mistakenly named postal service instead of postmaster as defendant, contrary to statutory requirements). Indeed,

> [a]lthough the relation back provisions of Rule 15 are to be somewhat liberally applied, the purpose of the provision does not support relation back in cases like this one: cases where the newly added defendants were known to the

> plaintiff before the running of the statute of limitations and where the potential defendants should not necessarily have known that, absent a mistake by the plaintiff, they would have been sued.

Powers, 148 F.3d at 1226. "'Nothing in the Rule or in the Notes indicates that the provision applies to a plaintiff who was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged.'" *Id.* at 1227 (quoting *Rendall-Speranza v. Nassim*, 107 F.3d 913, 918 (D.C. Cir. 1997)).

The First Amended Complaint does not satisfy the third requirement for relation back under Rule 15(c), and thus, Krupski's amendment, adding Costa Crociere S.p.A. as a Defendant, does not relate back to the date of her timely original Complaint.

IV. CONCLUSION

In accordance with the foregoing analysis, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss **[D.E. 43]**, being considered a Motion for Summary Judgment, is **GRANTED**. Defendant shall submit a proposed final judgment in Word or WordPerfect format to altonaga@flsd.uscourts.gov. Clerk of Court is instructed to **CLOSE** this case.

2. Any pending motions are **DENIED** as **MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 21st day of October, 2008.

/s/
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

APPENDIX C

Costa
CRUISING ITALIAN STYLE
Venture Corporate Center II
Suite 200
200 South Park Road
Hollywood, Florida 33021-8541

Tel: (954) 266-5661
Fax: (954) 266-5658

FACSIMILE MESSAGE

9 July, 2007

To: Turner & Turner
Attn: M.L. Turner

From: L. A. Klutz

Re: C. Magica
W. Krupski

FAX NO.:

1 page(s) including cover.

The information contained in this transmission is covered by the attorney-client privilege and is confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby

notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone collect and return the original message to us at the above address via the U.S. Postal Service. We will reimburse you for the postage. Thank you.

Dear Mr. Turner:

Thank you for your 2 July 2007 letter.

In order to facilitate our future attempts to achieve a pre-litigation settlement, please provide a detailed scenario of the circumstances giving rise to your client's alleged injuries, your thoughts on liability including legal citations, a full set of the passenger's medical records and proof of out of pocket loses. Upon receipt of this information and completion of our inquiries with the ship, we shall contact you.

Of course, all of the above is entirely without prejudice.

Regards,
L. A. Klutz /s/ L.A. Klutz 7/9/07
International Risk Services, Inc.
As Claims Administrator for
Costa Cruise Lines N.V.

APPENDIX D

Our Commitment To Responsible Development

[Fold-Out Exhibit, see next page]

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APPENDIX E

General Conditions of Passage Ticket Contract

[Fold-Out Exhibit, see next 11 pages]

General Conditions Of Passage Ticket Contract

PASSAGE TICKET CONTRACT

THIS IS YOUR PASSAGE TICKET CONTRACT. READ IT CAREFULLY AS SOON AS YOU RECEIVE IT. IT IMPOSES OBLIGATIONS AND LIMITS YOUR RIGHTS.

By accepting or using this ticket, you, the Passenger, acknowledge, accept and agree to all of its terms and conditions. Certain provisions are highlighted so call your attention to them but all provisions are important and binding upon you. The CARRIER undertakes to transport the Passenger and the Passenger's baggage only on the following basis, which the Passenger acknowledges and undertakes to comply with fully.

The limitations and contractual provisions herein shall apply to any and all disputes between the Passenger and the CARRIER, regardless whether the incident giving rise to the dispute occurs aboard the Vessel, ashore, or while the Passenger is en route to or from the Vessel by any mode of transportation including but not limited to tenders, buses, taxi, air carriers or private transportation.

DEFINITION OF TERMS USED IN THIS TICKET

When used in these General Conditions of Passage Ticket Contract (sometimes referred to as the "Contract"), the word "Passenger" shall mean each and any person traveling with the Passenger, including any persons traveling with the person or persons named on the ticket, named according to the Contract, it also means any such Passenger's spouse, estate, executors, administrators, heirs, successors and assigns and, if a minor, shall include the minor and the parent, guardian and persons in charge of the minor.

The word "CARRIER" when used in this Contract, shall mean Costa Crociere S.p.A. an Italian corporation, and all vessels and other ships owned, chartered, operated, managed or provided by Costa Crociere S.p.A., and all officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, superintendents, agents and assigns employed aboard said Vessel and the manufacturers of said Vessels and all their component parts.

The word "Vessel" when used herein shall also include any Vessel on which the Passenger may be traveling or decides which the Passenger may assert a claim.

The word "Cruise Fare" means the amount paid for the cruise, plus any travel taxes or fees that the CARRIER may be charged by the CARRIER. The Cruise Fare includes ocean transportation, accommodations and ordinary meals onboard the Vessel during the voyage. The Cruise Fare does not include gratuities, liquor, wine or other beverages, shore excursions, laundry, other goods or services purchased onboard the Vessel or ashore, or any other incidental charges or expenses. The Cruise Fare shall be deemed earned when paid and is non refundable except as provided in the CARRIER's brochure and in Paragraph 8 of this Contract.

1. NOTICE AND LIMITATION OF ACTIONS AGAINST THE CARRIER

The carrier shall not be liable for any physical or emotional injury, illness or death of the passen-

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General Conditions Of Passage Ticket Contract

ger unless written notice of the claim with full particulars is delivered to the carrier or his duly authorized agent within 185 days after the date of injury, illness or death. No suit shall be maintainable in any event unless filed within one year after the date of injury, illness or death, and unless served upon the carrier within 120 days after filing.

The carrier shall not be liable for any claims whatsoever, other than for physical or emotional injury, illness or death of the passenger unless written notice of the claim with full particulars is delivered to the carrier or its duly authorized agent within seven (7) days after the passenger shall be landed from the vessel or in the case the voyage is abandoned within seven (7) days thereafter. No suit whatsoever other than for personal injury, illness or death, shall be maintainable in any event unless filed within one year after the passenger shall be landed from the vessel or in the case the voyage is abandoned within one year thereafter and unless served upon the carrier within 120 days after filing.

2. ADDITIONAL LIMITATIONS OF LIABILITY

The CARRIER shall be liable only for its negligence. The CARRIER shall not be liable for acts of god, acts of war, civil commotion, riots, strikes, acts of terrorism or acts of sovereign states or governments. In addition to all of the restrictions and exemptions from liability provided in this Contract, the CARRIER shall have the benefit of all of the statutory provisions of the United States of America providing for limitations and exoneration from liability and the procedures provided thereby, including but not limited to §§ 4282, 4283A, 4286, 4285 and 4286 of the Revised Statutes of the United States of America (46 U.S.C. §§ 182, 183, 183b, 184, 185 and 186). Notwithstanding any provision of this Contract or law to the contrary, as to any voyage occurring wholly outside the United States, the CARRIER claims benefit of all restrictions, exemptions and limitations of the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1974 as well as the "Protocol to the Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ("Athens Convention"), and the "Convention on Limitation of Liability for Maritime Claims" of 1976 ("LLMC") which limit the liability of the CARRIER for death of or personal injury to the Passenger to no more than 46,666 Special Drawing Rights ("SDRs") as defined therein and all other limits for damage or loss to personal property. The value of 46,666 SDRs is equal to approximately US$66,700 at the time of printing of this Contract and the current value is available at the website: http://www.imf.org/external/np/sec/pr/index.htm. Further, the CARRIER shall be entitled, to the maximum extent allowed by law, to any and all liability limitations and immunities provided under the International Convention on Voyage Contracts ("CCV") signed at Brussels Belgium on April 23, 1970. In the event of any conflicts between the referenced provisions of the United States Code, the Athens Convention, the LLMC and the CCV CARRIER shall be entitled to invoke whichever provisions provide the greatest limitations and immunities to the CARRIER. Copies of the foregoing statutes and conventions are available from the CARRIER upon request. Nothing in this Contract is intended to, nor shall it operate to, limit or deprive the CARRIER of any such statutory limitation of, or exoneration from, liability.

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PASSAGE TICKET CONTRACT

General Conditions Of Passage Ticket Contract

3. LIMITATION OF LIABILITY OF THE CARRIER'S AGENTS, SERVANTS, AND OTHERS

All of the defenses, limitations and exceptions of whatever kind relating to the responsibility and liabilities of the CARRIER that may be invoked by the CARRIER by virtue of this Contract or by law are fully extended to and may also be invoked by all persons who may act on behalf of the CARRIER or on whose behalf the CARRIER may act. Such persons may include, without limitation to the CARRIER's parents, subsidiaries, affiliates, successors, assigns, representatives, agents, employees, servants, concessionaires and contractors, (a) the Vessels and other ships owned, chartered, operated, manned or provided by the CARRIER, and all masters, officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and others aboard such Vessels, and the manufacturers of such Vessels and all like employees or agents, (b) Costa Crociere S.p.A., the Netherlands Antilles corporation that is a sales and marketing agent for the CARRIER and the owner of this Passage Ticket Contract, (c) their parents, subsidiaries, affiliates, successors, assigns, representatives, agents, employees, servants, concessionaires and contractors, and (d) the Vessels and other ships owned, chartered, operated, manned or provided by them, and all masters, officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and others aboard such Vessels, and the manufacturers of such Vessels and all like employees or agents.

4. INCIDENTS OCCURRING OFF THE VESSEL

The CARRIER shall have no responsibility, obligation or liability of any kind to the Passenger for anything that occurs to the Passenger while off the Vessel, including but not limited to accidents, incidents, delays or any other events occurring while the Passenger is en route to or from the Vessel (including by air, not for warning the Passenger of any risks or hazards while off the Vessel without limiting the generality of the foregoing, the CARRIER is not responsible for incidents or claims which occur on shore accommodations or on excursions or shore visits organized or provided by the independent agencies that provide these services and the CARRIER does not guarantee the performance of such agencies.

5. LIMITATIONS OF LIABILITY FOR AND MATTERS INVOLVING BAGGAGE AND PERSONAL PROPERTY

a) The Passenger will be allowed a reasonable amount of baggage free of charge. Baggage means only such articles and similar personal effects as are necessary and appropriate for the purpose of the journey.

b) The Passenger, in the interest of international security and safety as well as in the interests of the convenience of other passengers, agrees and hereby consents to a reasonable search being made of the Passenger's person, baggage or other property, and to the removal and confiscation or destruction of any object which may, in the opinion of the CARRIER, impair the safety of the vessel or inconvenience other passengers.

c) The responsibility of the carrier for damages to or loss of the passenger's baggage, luggage or belongings is limited to the maximum sum of the lesser of five hundred U.S. dollars (US$500) per passenger or one hundred fifty U.S. dollars (US$150) per piece, unless prior to the beginning of the voyage, a higher value is declared in writing by the passenger and a higher tariff is paid equal to five percent (5%) of the declared value, provided, however, that under no circumstances shall the carrier be liable for an amount greater than the measured U.S. dollars (US$5,000), even in the event

General Conditions Of Passage Ticket Contract

6. **TICKET VALIDITY - MODIFICATION OF CONTRACT - TRAVEL DOCUMENTS**

a) This Contract is valid only for the persons or persons to whom it is issued. It is not transferable. It is valid only for the ship, the accommodations and the sailing date specified herein. It must be exhibited to any of the officers of the Vessel or officials of the CARRIER upon request. The CARRIER shall not be liable to make any refund to the Passenger in respect to lost tickets or in respect of tickets wholly or partly not used by the Passenger for any reason.

b) The CARRIER reserves the right to modify the terms and conditions of this Contract, including those relating to the rates and charges. If the Contract is materially modified, the Passenger shall have the right to cancel the Contract and receive a full refund of the amounts received by the CARRIER. This must be done by the Passenger no later than thirty (30) days prior to the sailing date or ten (10) days after receiving notice of the modifications, whichever date is later. Modifications of itinerary or interruption or cancellation of voyage or refund of passage as described in Paragraph 11 or 12 is not considered a modification of this Contract.

c) The Passenger must have in his or her own possession proper documentation required by the government of the port of embarkation and all ports of call. The Passenger is advised to consult with his or her travel agent, the appropriate governmental agencies and embassies to determine what documentation will be required. The CARRIER assumes no responsibility for advising the Passenger of immigration requirements. The CARRIER may refuse to embark the Passenger, or may disembark the Passenger in the event the Passenger does not present the required documentation. Such disembarkation or denied embarkation shall be without liability to The CARRIER and no refund of the Cruise Fare paid shall be due to the Passenger in such circumstances.

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PASSAGE TICKET CONTRACT

General Conditions Of Passage Ticket Contract

7. EXPENSES, TAXES AND CHARGES

The Cruise Fare does not include taxes and fees imposed or assessed by governmental or quasi-governmental authorities (including the operator of a port or harbor) which the CARRIER is obligated to collect from the Passenger or pay in respect of the Passenger or the ship and including customs inspection fees levied for embarkation, disembarkation or landing, arrival or departure taxes, assessed by authorities, passenger facility charges, and customs and immigration fees. These charges are in addition to the Cruise Fare and the Passenger shall pay these charges to the CARRIER in full immediately upon request by the CARRIER, irrespective of changes to these charges that are not material and do not give rise to a right of cancellation.

8. CANCELLATION, REFUND AND PENALTIES

Events as provided in Paragraphs 9 and Penalties: If this Contract or any ticket or part thereof is cancelled by the Passenger at any time before the commencement of the Passenger's journey, the Passenger shall pay to the CARRIER the following cancellation charges:

[illegible] per person of the Cruise Fare depending upon the specific ship, sailing and when the Contract was booked as follows.

For all cruises departing from US ports one (1) or more days prior to sailing: Forfeit deposit

For all cruises departing from non-US ports with departure date on or after November 30, 2006:

- 90 or more days prior to sailing: Forfeit deposit
- 89-61 days prior to sailing: Forfeit deposit
- 60-15 days prior to sailing: 25% of cruise fare per person
- 14-8 days prior to sailing: 50% of cruise fare per person
- 7 days or less prior to sailing: No refund, 100% cancellation charge

For cruises departing from non-US ports with departure date on or after November 30, 2006:

- 90 or more days prior to sailing: Forfeit deposit
- 89-61 days prior to sailing: Forfeit deposit
- 60-15 days prior to sailing: 25% of cruise fare per person
- 14-8 days prior to sailing: 50% of cruise fare per person
- 7 days or less prior to sailing: No refund, 100% cancellation charge

If the Passenger for any reason does not present himself or herself for the sailing date or misses a voyage that has already started, the Passenger is not entitled to any refund before departure.

The Passenger will be charged a US$50 administrative fee for changes to bookings after cruise documents have been issued. A change of a booking from an Airline/Package to cruise only constitutes a cancellation of the air portion of the package and is subject to the cancellation penalties indicated above, except that a US$50 penalty will apply for any cancellations made between 60 and 30 days prior to sailing. The above charges do not include cancellation or change fees that may be applied by air carriers, hotels or other service providers, which will be assessed in accordance with their respective policies.

9. INSURANCE

The CARRIER recommends that the Passenger purchase travel insurance prior to the time of the irrevocable payment on this Contract. The insurance is not in effect, however, unless and until the CARRIER has received and accepted the premium payment with final payment. If the Passenger has any questions about insurance coverage, the Passenger should check with the CARRIER before departure.

General Conditions Of Passage Ticket Contract

10. ASSIGNMENT OF ACCOMMODATIONS

11. MODIFICATION OF ITINERARY OR CANCELLATION OF VOYAGE

PASSAGE TICKET CONTRACT

General Conditions Of Passage Ticket Contract

voyage. The Passenger shall be entitled neither to any refund of the Cruise Fare nor to compensation of expenses nor to reimbursement of any expenses whatsoever, but will be given credit for the proportion of the Cruise Fare unused. The CARRIER shall use reasonable best efforts to arrange for the transportation of the Passenger and the Passenger's baggage to the port of destination by any other available means of transport.

d. The CARRIER and the Captain retain the right to forbid any order or instruction given from sources other than governmental departments.

e) Should the Vessel be late from its cause for any cause resulting from the Passenger's negligence or due to a medical emergency involving the Passenger, the Passenger shall be liable for any related extra expenses and shall indemnify the CARRIER for any costs, penalties, or demands arising therefrom.

12. RIGHT TO REFUSE PASSAGE OR SERVICES FOR HEALTH REASONS OR OTHER REASONS

a) The Passenger acknowledges and understands that sea travel by definition involves travel to places and ocean areas where the availability of medical care may be limited or delayed and where medical care and other services, evacuation may not be available. The Passenger represents that he or she is and shall be fit for such voyage. The CARRIER has the absolute right to refuse passage to the Passenger and to disembark any Passenger at any port during said voyage, at the Passenger's sole risk and expense, when in the sole discretion of the CARRIER the Passenger is deemed insufficiently fit for or otherwise unable to continue the voyage.

b) The Passenger must, at the time of booking the cruise, inform the CARRIER's Sales and Marketing Agent, Cruise Lines N.V., of any relevant physical or mental illness, disability or other condition for which the Passenger or any other passenger on their cabin may require medical attention or special accommodation during the voyage or for which the use of a wheelchair or service animal is contemplated or necessary. If any such condition arises after the Passenger has booked the cruise, the Passenger must report the condition to the CARRIER as soon as the Passenger becomes aware of it. Failure so report any such condition will relieve the CARRIER, the ship's doctor and all other personnel from any liability related to accommodation or treatment of such condition or for any other consequences whatsoever in connection therewith. Passengers who have special needs or are challenged are required to contact the CARRIER's Sales and Marketing Agent's Special Needs Desk - 800 GOCOSTA, ext. 5609.

c) The CARRIER may quarantine or confine the Passenger to their cabin, change the Passenger's accommodation or disembark or refuse the Passenger at any port if, in the sole opinion of the CARRIER, the Passenger's presence onboard might be detrimental to the Passenger's own health, comfort or safety or that of other passengers or the crew.

d) In the event that the Passenger is delayed or detained onboard the Vessel or elsewhere due to injury, illness, disability or quarantine or due to action of any government or authority or for any other reason not the fault of the CARRIER, then the Passenger shall be solely

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General Conditions Of Passage Ticket Contract

ly responsible for any costs and expenses, including repatriation, resulting therefrom and must reimburse the CARRIER for any such costs and expenses which it may incur on the Passenger's behalf.

13. RESPONSIBILITY OF THE PASSENGER AND DAMAGE, FINES, PENALTIES AND EXPENSES

a) The Passenger must at all times obey all of the rules, regulations and orders of the CARRIER and the vessel's Master. The Passenger may not solicit other passengers for commercial purposes or advertise goods or services onboard the vessel without the CARRIER's prior consent. It is the Passenger's responsibility to comply, without delay, with the requirements of all immigration, port, health, customs, and government police authorities, and all other laws and regulations of each country or state from or to which the Passenger will travel. The CARRIER shall not be liable to ensure the Passenger's compliance. The Passenger must reimburse the CARRIER for any costs or resulting expenses or fines that it may incur in such circumstances.

b) The Passenger, in the interest of international security and safety at sea, and in the interests of the convenience of other passengers, agrees and hereby consents to a reasonable search being made of the Passenger's person, baggage and other property, and to the removal and confiscation or destruction of any object which may, in the opinion of the CARRIER, impair the safety of the Vessel or inconvenience other passengers.

c) The Passenger, and if a minor, the Passenger's parent or guardian, shall be directly responsible to the CARRIER for all damages caused by the Passenger to the Vessel or to its furniture or equipment and for damage caused to other passengers or crew. The Passenger shall also be responsible for all fines, penalties or other expenses which the CARRIER may incur or which may be assessed against the Passenger, the Vessel or the CARRIER by port authorities, customs, immigration or health officers or by any other official of any country as a result of the Passenger's actions. The CARRIER has no obligation to refund any portion of the Cruise Fare paid nor to reimburse any expenses whatsoever to the Passenger if he or she is disembarked under Paragraph 12 of this Contract during the voyage or fails for any reason to be onboard the vessel when the vessel departs any port.

14. PROHIBITION AGAINST LIVE ANIMALS, INFLAMMABLES, EXPLOSIVES AND OTHER DANGEROUS WEAPONS, SUBSTANCES OR MATERIALS

The Passenger is forbidden to bring on board live animals, inflammables, firearms, ammunition, explosives, illegal drugs or other potentially harmful or dangerous weapons, substances or materials. The CARRIER reserves the right to refuse to permit the Passenger to take on board any item it deems inappropriate. The CARRIER also maintains the right to search the Passenger or the Passenger's accommodation or property for such items and to confiscate same without notice. Notwithstanding anything herein to the contrary, if the Passenger has physical limitations, he or she may travel with properly trained and certified assistance dogs (for example trained seeing eye dogs) provided Passenger assumes full responsibility for said dog's

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PASSAGE TICKET CONTRACT

General Conditions Of Passage Ticket Contract

food and hygiene and provided the CARRIER is provided advance notice of passenger's desire to embark with such diet. Passengers are advised that special diet may not be delivered off the vessel in some or all ports due to universal sanitation requirements and the Passenger is responsible for determining with local authorities where said dogs will be allowed ashore and whether said dogs can be returned back into the United States if taken onboard the vessel or brought ashore in any port.

15. INDEPENDENT CONTRACTORS

The CARRIER has made arrangements with independent contractors to provide to the passengers dedicated motorcoach goods, services and transportation, including but without limitation the following:

a) Goods and services provided onboard the vessel for the passenger's convenience by independent contractors including but without limitation barbers, hairdressers, manicurists, masseurs, photographers, entertainers, internet providers, photographers, concessionaires and others.

b) Goods, services or transportation provided elsewhere than onboard the vessel in connection with tours whether arranged or organized by said operators, travel agents or the CARRIER. Tours, sightseeing, hotels and transportation by vessels not owned or operated by the CARRIER or by or for land are not under the supervision and control of the CARRIER and the CARRIER makes no representation of any kind or nature.

The CARRIER shall have no responsibility, obligation or liability of any kind to the Passenger for any acts or omissions of any kind to the Passenger for any acts or omissions or for any loss, injuries or death in connection with or arising out of the enjoyment of such independent concessions. The Passenger and I have no claim against the CARRIER for any refunds in connection with goods, services or transportation provided by such independent concessions.

16. MEDICAL TREATMENT TO PASSENGERS

The vessel may or may not carry a ship's physician or other medical personnel. If such physician is onboard, he or she is employed as an independent concessionaire and services are available for the convenience of the passenger. The carrier is not obligated to provide any medical services to the passenger and the carrier shall not be liable for any medical care, diagnosis, or treatment rendered to the passenger, regardless whether such is rendered by a shipboard medical professional or others, and the passenger shall be liable for all costs and expenses incurred for medical care or transportation.

17. CONTRACT TERMS ARE SEVERABLE

If any portion or provision of this Contract shall be deemed invalid, illegal or unenforceable, this portion only shall be ineffective only to the limited extent of such invalidity, illegality or unenforceability and the remainder of this Contract

General Conditions Of Passage Ticket Contract

shall remain in full force and effect. In the event any provisions restricting or exempting the liability or responsibility of the CARRIER or limiting remedies therefore is invalid under applicable law, there shall be automatically substituted therefore the restriction or exemption from liability or responsibility of the CARRIER or limitation of remedies as the case may be most favorable to the CARRIER.

18. RESPONSIBILITY OF THE PASSENGER FOR PAYMENT

The travel agent, if any, who booked the Passenger's cruise acts at all times as the agent for the Passenger and not the CARRIER. The booking of the cruise and the delivery of this Contract by the Passenger's agent or by the CARRIER is binding upon the Passenger, and the Passenger shall be responsible to the CARRIER for the total amount of the Cruise Fare. The CARRIER is not liable for any representations or statements made by the travel agent with respect to the cruise program that has been purchased by the Passenger or for any conduct of the Passenger's travel agent, including without limitation any failure to remit the Passenger's deposit or other funds to the CARRIER or any failure to remit a refund from the CARRIER to the Passenger.

19. CHOICE OF FORUM; NO ARREST

a) For voyages which depart from, return to, or make any port call at a United States port, the Passenger agrees that all controversies, disputes, suits and matters of any kind whatsoever against the CARRIER or any controversies, disputes and matters of any kind arising out of, concerned with or incident to the voyage or this Contract, may be instituted only in the courts of Broward County, Florida, and any other action against the CARRIER shall be considered void. The General Maritime Law of the United States shall apply to any disputes arising in connection with such voyages.

b) For voyages which depart from, return to, or make any port call at a United States port, the Passenger further agrees that any such suits against the CARRIER in which the amount in controversy exceeds US$75,000 may be filed only in the United States District Court for the Southern District of Florida located in Broward County, Florida, and any other action against the CARRIER shall be considered void.

c) For voyages which do not depart from, return to, or make any port call at a United States port, the Passenger further agrees that any such suits against the CARRIER may be instituted only in the courts of Genoa, Italy. Italian law shall apply to any disputes arising in connection with such voyages.

d) Regardless whether or not the Passenger's voyage departs from, returns to or makes any port call at a United States port, the Passenger hereby waives any right to arrest or otherwise detain the Vessel in any jurisdiction.

20. LIMITATION ON CERTAIN DAMAGES

The CARRIER hereby disclaims all liability to the Passenger for damages for emotional distress, mental anguish or psychological injury of any kind under any circumstances, when such damages were neither the result of a physical injury to the Passenger, nor were the result of the Passenger having been at actual risk of a physical injury nor were intentionally inflicted by the CARRIER.

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PASSAGE TICKET CONTRACT

General Conditions Of Passage Ticket Contract

21. PASSENGER SAFETY
The CARRIER's vessels visit numerous ports in a number of countries. The CARRIER cannot guarantee the safety or security of passengers while ashore and, except for any responsibility it may have for the safety of passengers while being transported by the CARRIER between ports, it shall have no responsibility therefor. The CARRIER strongly recommends that passengers exercise due care for their own safety and security at all times while ashore. The United States Department of State and other governmental and quasi-governmental organizations regularly issue advisories and warnings to travelers and the CARRIER strongly recommends that the Passenger obtain and consider such information when making travel decisions. The CARRIER assumes no responsibility for furnishing such information.

22. GUEST GUIDE AND BROCHURE
The Passenger acknowledges receipt of the CARRIER's applicable Welcome Aboard Guide/Daily Program and represents that he/she has read the terms and conditions of sale set forth therein and agrees to be bound by such terms and conditions. The Guide/Daily Program is hereby incorporated into this Contract. Passenger and the CARRIER specifically agree that it is their mutual intent that the Passenger shall in no event be or be deemed a representative plaintiff, putative class member or otherwise participate in any class action or other representative action against the CARRIER.

23. PASSENGERS WHO ARE MINORS
The CARRIER shall neither accept for the Passenger if he or she is under the age of majority and unless the Passenger is travelling on the same cabin with his/her natural parent, guardian, or custodian, a parent or person with their spouse or attorney-in-fact, a parent or guardian or custodian acting on behalf of said minor must provide the CARRIER with a notarized letter of consent, proof of marriage and/or guardianship, as the CARRIER may be liable to make payments for any damages with respect to any failure by the Passenger to comply with or provide age or citizenship documentation as required by any government agency.

24. REPRESENTATIVE ACTIONS
Any action or proceeding against the CARRIER to enforce any obligation hereunder or arising out of any matter relating to this Contract, the Passenger and the CARRIER hereby agree that such action or proceeding shall be brought only in an individual capacity and not as a class action or other representative action, and the Passenger expressly waives any right he/she may have to bring such action or proceeding as a class action or other representative action.

24. LIMITATION ON VICARIOUS LIABILITY
The CARRIER shall not be held responsible for the intended or negligent acts of employees not employed by the CARRIER nor for any unintended or negligent acts of the CARRIER's employees committed while off duty or outside the course and scope of their employment.

25. ENTIRE CONTRACT
This Contract constitutes the entire agreement between the Passenger and the CARRIER. There are no other representations, understandings or warranties of the CARRIER, written or oral, except those expressly stated herein and this Contract may not be modified except by a writing signed by the CARRIER.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
DEC 18 2009
OFFICE OF THE CLERK

No. 09-337

IN THE

Supreme Court of the United States

WANDA KRUPSKI,

Petitioner,

v.

COSTA CROCIERE S.p.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a district court abuses its discretion and is clearly erroneous in concluding that a plaintiff in a maritime action who fails to file suit against the proper defendant before the limitations period runs is not entitled under Rule 15(c)(1)(C) to have her complaint relate back to a prior complaint, where (1) the plaintiff within the limitations period reviewed her ticket, which identified the proper defendant, and (2) the plaintiff, upon learning of the failure to sue the proper defendant, waited more than four months to sue that defendant?

LIST OF PARTIES

The only parties in this Court are Petitioner Wanda Krupski and Respondent Costa Crociere S.p.A. At one time, Costa Cruise Lines N.V., LLC was a defendant, but it was dismissed from the case in the district court.

Corporate Disclosure Statement: Respondent Costa Crociere S.p.A. is an Italian corporation. Its parent corporations are Carnival Corporation and Carnival PLC, which are publicly-held.

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STATEMENT OF THE CASE

Plaintiff Wandra Krupski purchased a ticket for a cruise aboard the *Costa Magica*. [DE 19-4 - pg 11-12; Pet. App. E] The ticket made unmistakably clear that the cruise was operated by an Italian corporation, Costa Crociere S.p.A.

In the definitions section of the ticket, Costa Crociere S.p.A. was specified as being the "Carrier":

> The word 'CARRIER' when used in this Contract, shall mean Costa Crociere S.p.A., an Italian corporation, and all Vessels and other ships owned, chartered, operated, marketed or provided by Costa Crociere S.p.A., and all officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns on board said the Vessels, and the manufacturers of said Vessels and all their component parts.

[Pet. App. 27a]

Other portions of the ticket made clear that—consistent with established principles of maritime law—an action for personal injuries arising from the cruise should be against the Carrier, Costa Crociere S.p.A. The ticket provided that "[t]he CARRIER shall be liable only for its negligence." [Pet. App. 28a] A venue provision provided that claims against the "CARRIER" seeking more than $75,000 had to be brought in federal district court in Broward County, Florida, "and any other action

against the CARRIER shall be considered void." [Pet. App. 36a] The limitation of liability provision stated that the "CARRIER" disclaimed liability for certain damages for emotional distress. [Pet. App. 36a]

The ticket listed on a cover sheet Costa Cruise Lines N.V., but it was clear that this entity was not the Carrier. The ticket specifically identified Costa Cruise Lines N.V. as "a sales and marketing agent for the CARRIER and the issuer of this Passage Ticket Contract." [Pet. App. 29a]

Finally, the Plaintiff was warned that the ticket contained important information. The front page stated:

> IMPORTANT NOTICE. PLEASE READ THE TICKET IN FULL UPON RECEIPT AS IT LIMITS YOUR LEGAL RIGHTS in accepting this ticket. Guests agree to be bound by all of its terms, including its limitations of the Guest's rights. Guest should carefully examine the ticket, especially the section noted as "GENERAL CONDITIONS OF PASSAGE TICKET CONTRACT" located on pages A1 to A14 of this book."

[DE 19-3 - pg 19][1]

1. The Petitioner's appendix contains the remainder of the travel documents, but omits this cover page.

THE CRUISE AND THE LAWSUIT AGAINST COSTA CRUISE LINES N.V.

The Plaintiff claims that she was injured onboard the cruise on about February 21, 2007, when she tripped and fell over a camera cable. [DE 1 - pg 3] Five months later her lawyer sent a letter to Costa Cruise Lines N.V., seeking compensation for her claimed injuries. [DE 26-2 - pg 13] The letter was answered by International Risk Services, Inc., identified as "Claims Administrator for Costa Cruise Lines, N.V." [DE 26-2 - pg 15]

On February 1, 2008, the Plaintiff filed suit in federal district court in Broward County, Florida. [DE 1] This was only a few weeks before the one-year time-for-suit limitation specified in the ticket was scheduled to run.

The complaint made clear that the Plaintiff and her attorney possessed the ticket for the cruise, and had reviewed it. [DE 1 - pg 2] The complaint stated that the suit was being filed in federal court in Broward County because the "passenger ticket contains a forum section [clause]." *Id.*

The Plaintiff named as the only defendant an entity which it called "Costa Cruise Lines, N.V. L.L.C. d/b/a Costa Cruise Lines, a foreign corporation (Netherlands Antilles)." [DE 1 - pg 1] The complaint alleged that Costa Cruise Lines was liable because it "owned, operated, managed, supervised and controlled the ocean-going passenger vessel known as the *Costa Magica*." [DE 1 - pg 2]

COSTA CRUISE LINES RAISES THE ISSUE OF THE CORRECT DEFENDANT, AND THE PLAINTIFF DOES NOTHING FOR FOUR MONTHS

Costa Cruise Lines N.V. was served on February 4, 2008, and answered the complaint on February 25th. [DE 19 - pg 2] In its answer, Costa Cruise Lines N.V. noted that under the passenger ticket "the undertaking to transport Plaintiff aboard the *Costa Magica* as carrier was by Costa Crociere, S.p.A., an Italian corporation." [DE 19-3 - pg 2] Costa Cruise Lines N.V. also noted that it was identified in the passenger ticket as the "sales and marketing agent for the carrier/vessel operator, Costa Crociere, S.p.A," and that Costa Cruise Lines N.V. "does not occupy a status" upon which it could be held liable under General Maritime Law. [DE 19-3 - pg 2-3]

The Plaintiff did nothing in response to this information.

COSTA CRUISE LINES N.V. MOVES FOR SUMMARY JUDGMENT

Three months later, Costa Cruise Lines N.V. moved for summary judgment on the basis that it wasn't the "carrier" and could not be held liable for injuries on board the *Costa Magica*. [DE 19] The motion was accompanied by an affidavit which stated that Costa Cruise Lines N.V. was a sales and marketing agency for vessels operated by Costa Crociere S.p.A., that Costa Cruise Lines N.V. did not own or operate any ships, and that the *Costa Magica* was owned and operated by Costa Crociere S.p.A. [DE 20 - pg 2]

The Plaintiff responded on June 13, 2008 with an unsworn memo of law. She stated that in July 2007 her attorney had conducted research about who was the proper defendant. [DE 26 - pg 2-3] The attorney could have researched who was the proper defendant by simply reading his client's ticket, which revealed that Costa Crociere S.p.A. was the carrier, and that Costa Cruise Lines N.V. was merely the sales and marketing agent. Indeed, the attorney reviewed part of the ticket [DE 1 - pg 2], but apparently not the relevant parts of the ticket.

Rather than review the terms of the ticket to determine the proper defendant, the attorney searched on the internet. [DE 26 - pg 2-3] In conducting the internet search, the attorney limited his search to (1) local corporations, and (2) corporations with the name "Costa Cruise Lines." *Id.* He first looked at www.costacruise.com, and found that "the only United States office" listed on the web site was "Costa Cruise Lines, N.V." *Id.* He then went to the Florida corporations web site, where he searched for "Costa Cruise Lines." He found that the only active name returned was Costa Cruise Lines N.V., L.L.C. [DE 26 - pg 2-3] He concluded that Costa Cruise Lines N.V., L.L.C. was the proper defendant.

The Plaintiff added that she still "reasonably believes and maintains that [Costa Cruise Lines N.V.] is a proper party to this case." [DE 26 - pg 4] She said that "it is too early to determine" whether Costa Cruise Lines should be dismissed from the lawsuit. *Id.* The Plaintiff also asked for leave to amend her complaint to add Costa Crociere S.p.A. as a defendant. *Id.*

The district court held a hearing on the motion for summary judgment. [DE 57] During the hearing, the Plaintiff admitted that Costa Cruise Lines N.V. was not a "carrier" under the ticket. "As it relates to Costa Cruise Lines N.V., I think that the plain language of the ticket, Costa Cruise Lines N.V. clearly can't be a carrier." [DE 57 - pg 16] Still, she argued that she should be given an opportunity to further investigate. *Id.* The district court denied the motion for summary judgment without prejudice, and granted the Plaintiff's motion for leave to amend to add Costa Crociere S.p.A. [DE 30]

THE PLAINTIFF AMENDS HER COMPLAINT TO ADD A CLAIM AGAINST COSTA CROCIERE S.P.A.

The Plaintiff filed an amended complaint which repeated the allegations against Costa Cruise Lines N.V. from the original complaint, and added new allegations against Costa Crociere S.p.A. [DE 31 - pg 3, 6]

The allegations against the two Defendants were similar but not identical. The Plaintiff alleged that Costa Cruise Lines N.V. was liable because it "owned, operated, managed, supervised and controlled the ocean-going passenger vessel known as the *Costa Magica*." [DE 31 - pg 3] On the other hand, the Plaintiff alleged that Costa Crociere S.p.A. was liable "as CARRIER under the terms of the passenger ticket contract." [DE 31 - pg 6]

THE MOTIONS TO DISMISS

Costa Cruise Lines N.V. moved to dismiss the amended complaint. [DE 35] The Plaintiff responded by admitting that she had no claim against Costa Cruise Lines N.V., and voluntarily dismissed that claim. [DE 42]

Costa Crociere S.p.A. also moved to dismiss the complaint. [DE 43] It argued that it was not sued within the time-for-suit limitation, and that the amended complaint in which it was sued did not relate back to the original complaint. [DE 43 - pg 1]

THE DISTRICT COURT'S DECISION

The district court treated the motion to dismiss as a motion for summary judgment, giving the parties the opportunity to present material outside the pleadings. [Pet. App. 8a] The court granted summary judgment in Costa Crociere S.p.A.'s favor.

The district court found that the first two requirements of Rule 15(c)(1)(C) were satisfied: the claim against Costa Crociere S.p.A. arose out of the conduct, transaction, or occurrence set out in the original complaint, and Costa Crociere S.p.A. received sufficient notice of the action that it would not be prejudiced in defending on the merits (noting that both entities were represented by the same counsel and had an identity of interest). [Pet. App. 14a-18a]

However, the district court found that the third requirement was not satisfied—the Plaintiff had not established that Costa Crociere S.p.A. "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." [Pet. App. 18a] The court concluded that "[a]lthough Costa Crociere S.p.A. may have had constructive notice of this action within 120 days of the Original Complaint, Krupski's First Amended Complaint cannot relate back under Rule 15(c)(1)(C)(ii) because her failure to timely name Costa Crociere S.p.A. as a defendant was not the result of a 'mistake.'" [Pet. App. 19a] "This is not a case where there was a lack of knowledge of the existence of the proper party or the identity of the proper party. Nor is this amendment sought because of a scrivener's error." [Pet. App. 20a] The court concluded that the relation back provisions of Rule 15 did not apply in a case like this, "where the newly added defendants were known to the plaintiff before the running of the statute of limitations and where the potential defendants should not have necessarily known that, absent a mistake by the plaintiff, they would have been sued." [Pet. App. 20a-21a]

THE CIRCUIT COURT OPINION

The Eleventh Circuit affirmed the district court. *Krupski v. Costa Cruise Lines N.V.*, 330 Fed. Appx. 892 (11th Cir. 2009).

The circuit court stated that the "determinative question is whether Krupski's suit against Costa Cruise rather than Costa Crociere was the result of a 'mistake concerning the proper party's identity' as contemplated

by Rule 15(c)(1)(C)." [Pet. App. 5a-6a] The court held that the district court did not err in concluding that the Plaintiff's amendment adding Costa Crociere S.p.A. as a defendant was not due to the kind of mistaken identity addressed by Rule 15(c). [Pet. App. 6a]

The court stated that "Krupski concedes that if suing Costa Cruise, and not Costa Crociere, was a deliberate choice, no 'mistake' occurred and the suit against Costa Crociere is time-barred." [Pet. App. 6a] The court noted that nothing in Rule 15 or the Advisory Committee Notes "indicates that the provision applies to a plaintiff who was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged." [Pet. App. 5a].

The court explained the facts demonstrating the Plaintiff's decision to file suit against Costa Cruise Lines, despite its knowledge of Costa Crociere S.p.A.:

> Undisputed . . . is that Krupski kept her ticket and furnished it to counsel shortly after the alleged injury. Costa Crociere, not Costa Cruise, was clearly identified in the Ticket's definition of "Carrier." The identity and knowledge of Costa Crociere as a potential party shortly after the alleged injury, therefore, must be imputed to Krupski and her counsel.
>
> Indeed, Krupski conceded before the district court that under the plain language of the Ticket, Costa Cruise could not be the Carrier. We agree with the district court that

> this is not a case about simple mistake of identity or misnomer—to the contrary, Krupski chose to sue one potential party and not another even though the identity of both was known to her.

[Pet. App. 6a]

The circuit court also noted the Plaintiff's delay in adding Costa Crociere S.p.A. as defendant after she learned of her alleged "mistake." [Pet. App. 7a] The Plaintiff was told in the answer filed on February 25, 2008 about Costa Crociere's identity, yet she did not file an amended complaint adding Costa Crociere until 133 days later. *Id.* The court stated that "Krupski offers no reason for this delay." *Id.*

The Eleventh Circuit's opinion was unanimous, and the court specified that it would not be published. [Pet. App. 1a] The Plaintiff did not ask the court to publish the opinion.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition. First, even if there were an important legal issue for the Court to review, this case is not a proper vehicle for review. Second, while there is some variation among the circuits in their consideration of Rule 15(c)(1)(C), there is no reason to review this case.

I. THIS CASE IS NOT A SUITABLE VEHICLE FOR REVIEW OF THE ISSUES RAISED IN THE PETITION

Even if the case presented an issue of law appropriate for review by the Court, this case would not be a suitable vehicle for review of the legal issue.

A. Contrary to the Petition, the circuit court did not create an "imputed knowledge" exception to Rule 15(c)(1)(C), but simply acknowledged the well-accepted principle that a party is charged with knowledge of a document which it possesses and reviews

The Court should deny the Petition because it mischaracterizes the opinion of the circuit court.

The circuit court considered whether there was a "mistake" under Rule 15(c)(1)(C). As the court noted, "Krupski concedes that if suing Costa Cruise, and not Costa Crociere, was a deliberate choice, no 'mistake' occurred and the suit against Costa Crociere is time-barred." [Pet. App.6a] In analyzing this question, the court noted that "Krupski kept her Ticket and furnished it to counsel shortly after her alleged injury," and that "Costa Crociere, not Costa Cruise, was clearly identified in the Ticket's definition of 'Carrier.'" *Id.* Further, it was clear that the Plaintiff's counsel had reviewed the ticket, as the Plaintiff complied with other provisions of the ticket (including notification of the claim, forum selection, and time for suit as to Costa Cruise Lines N.V.). [DE 1 - pg 2]

Based on these facts, the Court made the common-sense conclusion that the Plaintiff was charged with knowledge of what was in the ticket: "The identity and knowledge of Costa Crociere as a potential party shortly after the alleged injury, therefore, must be imputed to Krupski and her counsel." [Pet. App. 6a]

Based on this sentence, the Plaintiff claims that "[t]he decision of the Eleventh Circuit creates an 'imputed knowledge' exception" to Rule 15(c)(1)(C). [Pet. at 7] Similarly, the Plaintiff in her "Question Presented" claims that the circuit court "concluded that there can be no such 'mistake' where the Plaintiff had imputed knowledge of the identity of the added Defendant prior to filing suit."

The Plaintiff's claim that the circuit court created a new rule of law, an exception to Rule 15(c)(1)(C), is not accurate. The circuit court decided a case, and in the process made an uncontroversial statement that a party is charged with knowledge of a document which (1) was in the party's possession, and (2) the party admitted that it reviewed, and (3) was not claimed to be confusing or illegible. There is nothing noteworthy about this question. *See generally Oltman v. Holland America Line*, 538 F.3d 1271, 1276-77 (9th Cir. 2008); *Marek v. Marpan Two*, 817 F.2d 242, 247 (3d Cir. 1987); *Deiro v. American Airlines*, 816 F.2d 1360, 1364-65 (9th Cir. 1987).

B. The Plaintiff failed to assert estoppel

This case is an unsuitable vehicle for the additional reason that the Plaintiff failed to assert a doctrine relevant to her case, a doctrine which she could have argued would have afforded her the relief which she was denied under Rule 15(c)(1)(C). She could have but did not assert an estoppel argument.

Under Rule 15, an amendment relates back when "the law that provides the applicable statute of limitations allows relation back." Rule 15(c)(1)(A). The

Committee Note to the 1991 amendment to the rule explains that "[i]n some circumstances, the controlling limitations law may be federal law. Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim."

Here, the controlling law is admiralty law. Admiralty law may permit an estoppel argument under the circumstances of this case. As the leading commentator explains, "The proper defendant in a passenger case is the shipowner or operator, not brokers or agents who issue the ticket or manage the ship for a disclosed principal. If the defendant's actions make it difficult to ascertain the party who should be held responsible, the doctrine of equitable estoppel may be used to overcome a time bar for suit." T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-5 (2010 update).

In one case, a passenger injured on a cruise ship sued the sales agent instead of the operator of the ship. *Schrader v. Royal Caribbean Cruise Line*, 952 F.2d 1008 (8th Cir. 1992). The two entities had similar names—the sales agent was Royal Caribbean Cruise Line, Inc., while the ship operator was Royal Caribbean Corporation. After the limitations period had run, the plaintiff sued the proper defendant, the ship operator. The district and circuit courts both ruled that the plaintiff had failed to establish the requirements of Rule 15(c). But the circuit court reversed the summary judgment for the defendant on the basis that there was a jury question on whether the defendant was estopped from relying on the limitations period because it misled the plaintiff as to the identity of the proper defendant.

Accordingly, even a plaintiff who cannot succeed under the specific requirements of Rule 15(c)(1)(C) might be able to prevail under an estoppel argument. *See Axelrod v. Incres Steamship Co.*, 363 F.2d 531, 532 (2d Cir. 1966); *Fugaro v. Royal Caribbean Cruises Ltd.*, 851 F. Supp. 122 (S.D.N.Y. 1994). The Plaintiff's failure to assert estoppel makes this an unsuitable vehicle for review of the issues raised in the Petition.

C. The Petition contains assertions of fact not supported by the record

An additional reason why this case is not a suitable vehicle for review of the issues raised is that the record is sparse, and this spareseness has led the Plaintiff to make factual assertions which are without support in the record.

The burden of establishing "relation back" rested with the Plaintiff.[2] Even though the case was decided on summary judgment, the Plaintiff still had the burden of coming forward with evidence to rebut the time-for-suit defense and to support her argument that her

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2. *Smith v. Chyrsler Corp.*, 45 Fed. App. 326, 1 (5th Cir. 2002); *Dodson v. Hillcrest Securities*, 95 F.3d 52, *10 (5th Cir. 1996) (unpublished opinion); *Tubre v. Western Diversified Casualty Insurance Co.*, 2009 WL 3447255 (E.D. La. Oct. 19, 2009); *Moore v. Horel*, 2009 WL 2513920 (E.D. Cal. Aug. 18, 2009); *Estate of Grier v. University of Pennsylvania Health System*, 2009 WL 1652168 (E.D. Pa. June 11, 2009); *Pitre v. Tera Technologies*, 2008 WL 4831657 (E.D. La. Nov. 6, 2008); *VKK Corp. v. National Football League*, 187 F.R.D. 498, 500 (S.D.N.Y. 1999); *Irvin v. City of Chicago*, 2007 WL 3037051 (N.D. Ill. Oct. 15, 2007).

amended complaint related back to her original complaint. *See Dodson v. Hillcrest Securities*, 95 F.3d 52, *10 (5th Cir. 1996) (unpublished opinion) ("While [the defendant] had the burden on summary judgment of presenting evidence sufficient to prove its statute of limitations defense, [the plaintiff] had the burden of proof to rebut the statute of limitations grounds by relation back under Rule 15(c)."); *Smith v. Chyrsler Corp.*, 45 Fed. App. 326, 1 (5th Cir. 2002); *Pitre v. Tera Technologies*, 2008 WL 4831657 (E.D. La. Nov. 6, 2008); *Logwood v. Apollo Marine Specialists*, 772 F.Supp. 925, 929 (E.D. La. 1991).

In this case, there were large gaps in the record. While the Defendant submitted an affidavit in support of its argument against relation back, the Plaintiff did not submit any sworn evidence.

Since the record contained few facts to support the Plaintiff's argument, she made unsworn assertions in the trial court, repeated them in the circuit court, and repeats them again here. For example, she alleges that "the 'mistake,' *as explained by Petitioner's counsel*, was an initial misunderstanding over which of the many 'Costa' entities was the name of the ship operator responsible for Mr. Krupski's injuries." [Pet. at 10, emphasis added] But the only place where the Plaintiff's counsel "explained" anything was in unsworn argument. Indeed, the Plaintiff acknowledges this: "The only explanation of record is that found in the Responses filed by Petitioner in the District Court in response to Summary Judgment or dismissal motions." [Pet. at 10 n.3] These responses were not sworn (and there was no request for an evidentiary hearing).

These unsworn assertions by counsel are not evidence. "[L]egal memoranda and oral argument are not evidence, and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

Since the record lacks evidence to support the Plaintiff's position, this case would be a poor vehicle to consider the legal issues raised in the Petition.

D. The circuit court's opinion was unpublished

The circuit court's opinion was unpublished. Even if the Plaintiff were correct in her argument that the circuit court created a new exception to Rule 15, that "exception" does not exist outside of this lawsuit. Under Eleventh Circuit rules, unpublished opinions are "not considered binding precedent," and the court "generally does not cite to its 'unpublished' opinions because they are not binding precedent." 11th Cir. R. 36-2; 11th Cir. Rule 36, IOP 7 & 6. A rule of law stated in one unpublished, nonprecedential opinion does not justify review by this Court.

II. The merits of the case do not present an important issue for the Court to review

As explained above, this case is not a proper vehicle for consideration of the issues which the Plaintiff raises. But there is a more fundamental reason for denying the writ: the case does not involve important enough issues, and the result of the circuit court was proper.

A. The case involves an appellate court's determination that the trial court was not clearly erroneous or did not abuse its discretion

The case does not present an issue suitable for Supreme Court review.

The heart of the opinion of the circuit court is the following conclusion: "We agree with the district court that this is not a case about simple mistake of identity or misnomer—to the contrary, Krupski chose to sue one potential party and not another even though the identity of both was known to her." [Pet. App. 6a]

This conclusion is not a statement of law. It is, instead, either a finding of fact or an application of Rule 15(c)(1)(C), both of which receive deferential review. As the circuit court explained, even where the district court enters summary judgment, the appellate court reviews a district court's application of Rule 15(c)(1)(C) for abuse of discretion, and reviews findings of fact necessary for application of the rule for clear error. [Pet. App. 3a-4a] *See also VKK Corp. v. National Football League*, 244 F.3d 114, 127 (2nd Cir. 2001) ("We review for abuse of discretion a district court's determination that an amended complaint does not relate back to the original complaint."); *Popp Telecom v. American Sharecom*, 361 F.3d 482, 489-90 (8th Cir. 2004) ("The district court's application of Rule 15(c) is reviewed for an abuse of discretion."); *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008) ("The district court did not abuse its discretion in finding relation back to be appropriate here."). *But see Williams v. Boeing Co.*, 517 F.3d 1120, 1132 (9th Cir. 2008).

While the Plaintiff may disagree with the district court's conclusion, or the circuit court's affirmance of the district court's conclusion, there is not an appropriate basis for Supreme Court review. The Plaintiff's argument is merely an assertion of "erroneous factual findings or the misapplication of a properly stated rule of law," S.Ct. R. 10, and not a basis for review in this Court.

B. The result in this case was proper under abundant legal authority

Even if this case did present an issue of law appropriate for review by the Court, and even if this were a suitable case for review of the legal issue, the Court should not grant the writ because the result in this case was proper under abundant legal authority.

Here, two matters were or should have been apparent to the Plaintiff. First, it is fundamental that in maritime "[t]he proper defendant in a passenger case is the shipowner or operator, not brokers or agents who issue the ticket or manage the ship for a disclosed principal." SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-5 (2010 update). *Accord Chan v. Society Expeditions*, 123 F.3d 1287, 1293 (9th Cir. 1997). Second, the ticket received by the Plaintiff, and reviewed by her lawyer, stated that (a) the carrier/owner/operator was Costa Crociere S.p.A, and (b) Costa Cruise Lines N.V., was the sales and marketing agent for Costa Crociere S.p.A. Despite this, the Plaintiff sued Costa Cruise Lines, not Costa Crociere.

There is abundant authority that Rule 15(c)(1)(C) does not allow the relation back of a complaint where the plaintiff all along had knowledge of the proper defendant. Where a party possesses knowledge of the proper defendant, but does not sue that defendant, the action is not a "mistake concerning the proper party's identity" under Rule 15(c). "Rule 15(c) was never intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion to notice of a potential party. . . ." *Kilkenny v. Arco Marine*, 800 F.2d 853, 858 (9th Cir. 1986). "A plaintiff's ignorance or misunderstanding about who is liable for his injury is not a 'mistake' as to the defendant's 'identity.'" *Hall v. Norfolk Southern Railway Co.*, 469 F.3d 590, 596-97 (7th Cir. 2006).[3]

Courts have recognized that nothing in the history of Rule 15(c)(1)(C) suggests that such conduct by a plaintiff is to be excused. "Nothing in the Rule or in the Notes indicates that the provision applies to a plaintiff who was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged."

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3. *See also Sandoval v. American Building Maintenance Industries*, 578 F.3d 787, 792 (8th Cir. 2009); *Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998); *Woods v. Indiana University-Purude University at Indianapolis*, 996 F.2d 880, 887 (7th Cir. 1993); Rebecca S. Engrav, *Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c)*, 89 CAL. R. REV. 1549, 1587 (2001) ("When it seems likely that the plaintiff knew the additional defendant existed but failed to name it either through carelessness or because of poor legal advice, courts are likely to deny relation back."). *Compare Goodman v. Praxair, Inc.*, 494 F.3d 458 (4th Cir. 2007); *Leonard v. Parry*, 219 F.3d 25 (1st Cir. 2000).

Rendall-Speranza v. Nassim, 107 F.3d 913, 917-19 (D.C. Cir. 1997). "In fact, the Notes speak of a defendant that may properly be added under Rule 15(c) as an 'intended defendant,' and of an amendment pursuant to the Rule as 'a name-correcting amendment.'" *Id. See also Nelson v. Adams USA*, 529 U.S. 460, 467 n.1 (2000) ("Rule 15(c)(3) . . . applies only in cases involving 'a mistake concerning the identity of the proper party.' Fed. Rule Civ. Proc. 15(c)(3)(B). Respondent Adams made no such mistake. It knew of Nelson's role and existence. . . .").

C. The court properly considered the Plaintiff's delay in filing suit against Costa Crociere S.p.A.

The Plaintiff argues that the circuit court improperly considered her delay after she claims to have learned that Costa Cruise Lines N.V. was the wrong defendant. The circuit court noted that the Plaintiff failed to seek leave to amend her complaint until June 2008, even though Costa Crociere was identified in Costa Cruise Lines N.V.'s answer, filed more than four months earlier.

The Plaintiff claims that it is "illogical to consider post-suit information in assessing pre-suit knowledge," and that it is also "illogical to consider post-suit delay in amendment as probative of whether the failure to sue the added defendant initially was a 'mistake concerning the proper party's identity.'" [Pet. at 20]

Contrary to the Plaintiff's argument, the courts consider post-suit events in determining whether the requirements of Rule 15(c)(1)(C) have been satisfied. The Plaintiff relies on *Leonard v. Parry*, 219 F.3d 25(1st

Cir. 2000), but the court there noted that post-filing events can be relevant. The court stated that *knowledge* obtained by the plaintiff post-filing is without weight in determining his state of mind when he filed the complaint. *Id.* at 29. However, "post-filing events (including inaction in the face of new information)" are relevant "to the extent that they (a) shed light upon the plaintiff's state of mind when he filed the original complaint, or (b) inform an added party's reasonable belief concerning the cause of her omission from that complaint." *Id.* at 30. *See also Springman v. AIG Marketing Inc.*, 523 F.3d 685, 689-90 (7th Cir. 2008).

Here, the Plaintiff waited more than four months to act after learning that Costa Cruise Lines N.V. was not a proper defendant. The Plaintiff's lack of action in the face of this notice suggests that the Plaintiff's decision to sue Costa Cruise Lines was a deliberate decision, rather than a "mistake concerning the proper party's identity" under Rule 15(c).

The circuit court properly considered post-filing events. At the very least, the consideration of post-filing events is not a basis for granting review.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
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No. 09-337

In The
Supreme Court of the United States

WANDA KRUPSKI, a single person,
Petitioner,

v.

COSTA CROCIERE, S.p.A.,
a foreign corporation (Italy),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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Petition for Certiorari Filed September 15, 2009
Petition for Certiorari Granted January 15, 2010

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Complaint and Jury Demand (2/1/08) . . . . . JA 21

Answer (2/25/08) . . . . . JA 29

Affidavit of Laurence A. Klutz (5/6/08) . . . . JA 33

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Plaintiff's Response to Defendant's Motion for Summary Judgment and Motion for Leave to Amend Complaint to Add Costa Crociere, S.p.A. as a Defendant (6/13/08) . . . . . JA 41

Exhibit 2: Costa Cruise Lines website "Costa offices worldwide" . . . . . JA 56

Exhibit 3: Florida Department of State Division of Corporations website "Entity Name List" . . . . . JA 62

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A: Opinion, United States Court of Appeals for the Eleventh Circuit (6/22/09) ... 1a

Appendix B: Order, United States District Court for the Southern District of Florida (10/21/08) 8a

Appendix C: Facsimile Message (7/9/07), DE 26-2, p. 15 ..... 23a

Appendix D: Excerpt, Travel Documents, DE 26-2, p. 2 (fold-out exhibit) 25a

Appendix E: Passenger Ticket, DE 6-2, pp. 1-11 (fold-out exhibit) 26a

RELEVANT DOCKET ENTRIES

United States District Court for the Southern District of Florida (Ft. Lauderdale)

0:08-cv-60152-CMA

Krupski v. Costa Cruise Lines, N.V., LLC

Date Filed	#	Docket Text
02/01/2008	1	COMPLAINT against Costa Cruise Lines, N.V., LLC Filing fee $ 350. Receipt#: 542186, filed by Wanda Krupski.(dj) (Entered: 02/01/2008)
02/01/2008	2	Summons Issued as to Costa Cruise Lines, N.V., LLC. (dj) (Entered: 02/01/2008)
02/13/2008	3	AFFIDAVIT of Service for Return of Service served on CT Corporation on 02-04-08, filed by Wanda Krupski. (Berlowitz, Jeffrey) Modified on 2/14/2008 (ls). "Wrong Event Used, Re-docketed as Entry 4 ; Summons Returned Executed". (Entered: 02/13/2008)
02/13/2008	4	SUMMONS Returned Executed Costa Cruise Lines, N.V., LLC served on 2/4/2008, answer due 2/25/2008. [See Image at DE #3]

Date Filed	#	Docket Text
		(ls) (Entered: 02/14/2008)
02/14/2008	5	NOTICE of Docket Correction and Instruction to Filer: re 3 Affidavit of Service filed by Wanda Krupski, Error: Wrong Event Selected; Correction= Redocketed as Summons Returned Executed. Instruction to Filer=In the future please select the proper Event; (ls) (Entered: 02/14/2008)
02/25/2008	6	ANSWER to Complaint by Costa Cruise Lines, N.V., LLC. (Attachments: # 1 Exhibit)(Horr, David) (Entered: 02/25/2008)
02/26/2008	7	Order Requiring Joint Scheduling Report and certificates of interested parties to be filed by 3/19/2008.Signed by Judge Cecilia M. Altonaga on February 26, 2008.(ps1) (Entered: 02/26/2008)
03/14/2008	8	MOTION for Limited Appearance, Consent to Designation and Request to Electronically Receive Notice of Electronic Filings for Matthew L. Turner, Filing Fee $75, Receipt #542543. (cw) (Entered: 03/14/2008)

Date Filed	#	Docket Text
03/17/2008	9	ORDER granting 8 Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings (CMA) (Entered: 03/17/2008)
03/18/2008	10	REPORT REGARDING by Costa Cruise Lines, N.V., LLC. (Attachments: # 1 Proposed Order)(Horr, David) (Entered: 03/18/2008)
03/19/2008	11	Corporate Disclosure Statement by Wanda Krupski. (Berlowitz, Jeffrey) (Entered: 03/19/2008)
03/20/2008	12	ORDER SETTING TRIAL AND PRE-TRIAL SCHEDULE, REQUIRING MEDIATION, AND REFERRING CERTAIN MOTIONS TO MAGISTRATE JUDGE: Trial set for 2 week trial period that begins on 3/16/2009 in Miami Division before Judge Cecilia M. Altonaga. Calendar Call set for 3/10/2009 at 09:00 AM at the same location. Motions to amend pleadings or join parties are due by 6/27/2008; all discovery due by 11/21/2008. Proposed order scheduling mediation due by 4/21/2008; mediation to be completed and

Date Filed	#	Docket Text
		report filed by 12/1/08. Motions in limine due by 1/26/2009; all pretrial motions due by 12/10/2008. Signed by Judge Cecilia M. Altonaga on March 19, 2008.(ps1) (Entered: 03/20/2008)
03/20/2008	13	Corporate Disclosure Statement by Costa Cruise Lines, N.V., LLC. (Attachments: # 1 # 2)(Scarry, Brian) (Entered: 03/20/2008)
03/26/2008	14	CLERK'S NOTICE correcting trial setting. The trial period begins on March 16, 2009. (ps1) (Entered: 03/26/2008)
03/26/2008	15	CLERK'S NOTICE re 14 notice correcting trial date - the calendar call is set for March 10, 2009; trial period begins on March 16, 2009. (ps1) (Entered: 03/26/2008)
04/07/2008	16	Case Reassignment of Paired Magistrate Judge pursuant to Administrative Order 2008-09 to Judge Stephen T. Brown. Judge William C. Turnoff no longer assigned to the case. (ra) (Entered: 04/07/2008)
04/10/2008	17	ORDER on Discovery [See order for full details].Signed by

Date Filed	#	Docket Text
		Magistrate Judge Stephen T. Brown on 04-09-08.(dt) (Entered: 04/10/2008)
04/23/2008	18	ORDER Requiring proposed order scheduling mediation to be submitted by April 30, 2008.Signed by Judge Cecilia M. Altonaga on April 23, 2008.(ps1) (Entered: 04/23/2008)
05/06/2008	19	Defendant's MOTION for Summary Judgment *and Memorandum of Law* by Costa Cruise Lines, N.V., LLC. Responses due by 5/20/2008 (Attachments: # 1 # 2 # 3)(Scarry, Brian) (Entered: 05/06/2008)
05/06/2008	20	NOTICE by Costa Cruise Lines, N.V., LLC *of Filing Affidavit of Laurence A. Klutz* (Attachments: # 1 # 2)(Scarry, Brian) (Entered: 05/06/2008)
05/08/2008	21	ORDER DISMISSING CASE WITHOUT PREJUDICE.Signed by Judge Cecilia M. Altonaga on May 8, 2008.(ps1) (Entered: 05/08/2008)
05/16/2008	22	MOTION to Reopen Case *and Set New Briefing Schedule on Motion for Summary Judgment* by Wanda Krupski. (Attachments: #

Date Filed	#	Docket Text
		1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3)(Berlowitz, Jeffrey) (Entered: 05/16/2008)
06/05/2008	23	ORDER granting 22 Motion to Reinstate Case; deadlines in the trial order remain in effect; the parties are to file a proposed order scheduling mediation by June 16, 2008. Signed by Judge Cecilia M. Altonaga on June 5, 2008. (ps1) (Entered: 06/05/2008)
06/11/2008	24	NOTICE by Costa Cruise Lines, N.V., LLC *Notice of Mediation* (Horr, David) (Entered: 06/11/2008)
06/12/2008	25	NOTICE of Instruction to Filer: re 24 Notice (Other) filed by Costa Cruise Lines, N.V., LLC Error: Wrong Event Selected; Should have selected "Notice of Mediation hearing", under Mediation Documents. Instruction to Filer=In the future please select the proper Event; (lk) (Entered: 06/12/2008)
06/13/2008	26	RESPONSE to Motion re 19 Defendant's MOTION for Summary Judgment *and Memorandum of Law and Motion for Leave to Amend Complaint to Add Costa Crociere, S.p.A. as a*

Date Filed	#	Docket Text
		Defendant filed by Wanda Krupski. Replies due by 6/23/2008. (Attachments: # 1 Exhibit 1 through 6)(Berlowitz, Jeffrey) (Entered: 06/13/2008)
06/16/2008	27	ORDER Scheduling Mediation with John Freud: Mediation Hearing set for 10/22/2008 09:00 AM. Signed by Judge Cecilia M. Altonaga on June 13, 2008. (ps1) (Entered: 06/16/2008)
06/18/2008	28	NOTICE of Hearing on all pending Motions, re: Defendant's 19 MOTION for Summary Judgment *and Memorandum of Law* and on Motion for Leave to Amend Complaint to Add Costa Crociere, S.p.A as a Defendant: Motion Hearing set for 7/2/2008 02:00 PM in Miami Division before Judge Cecilia M. Altonaga. (ps1) (Entered: 06/18/2008)
06/23/2008	29	REPLY to Response to Motion re 19 Defendant's MOTION for Summary Judgment *and Memorandum of Law* filed by Costa Cruise Lines, N.V., LLC. (Scarry, Brian) (Entered: 06/23/2008)
07/03/2008	30	ORDER denying without prejudice 19 Motion for Summary

Date Filed	#	Docket Text
		Judgment; Plaintiff's 26 motion for leave to amend complaint is granted. Plaintiff is instructed to file an amended complaint in accordance with the instructions outlined in the order. Signed by Judge Cecilia M. Altonaga on July 3, 2008. (ps1) (Entered: 07/03/2008)
07/11/2008	31	AMENDED COMPLAINT, filed by Wanda Krupski.(Berlowitz, Jeffrey) (Entered: 07/11/2008)
07/11/2008	32	Minute Entry for proceedings held before Judge Cecilia M. Altonaga: Motion Hearing held on 7/2/2008 re 19 Defendant's MOTION for Summary Judgment *and Memorandum of Law*: filed by Costa Cruise Lines, N.V., LLC. Order entered. Court Reporter: Barbara Medina - phone number 305-523-5518 (ps1) (Entered: 07/11/2008)
07/14/2008	33	Summons Issued as to Costa Crociere, SPA. (lk) (Entered: 07/14/2008)
07/25/2008	34	MOTION to Appoint Counsel, Defendant's MOTION to Dismiss 31 Amended Complaint by Costa Cruise Lines, N.V., LLC. Responses due by 8/11/2008

Date Filed	#	Docket Text
		(Attachments: # 1 Exhibit)(Scarry, Brian) (Entered: 07/25/2008)
07/28/2008	35	Defendant's MOTION to Dismiss 31 Amended Complaint by Costa Cruise Lines, N.V., LLC. Responses due by 8/14/2008 (Attachments: # 1 Exhibit)(Scarry, Brian) (Entered: 07/28/2008)
07/28/2008	36	NOTICE of Striking 34 MOTION to Appoint CounselDefendant's MOTION to Dismiss 31 Amended Complaint filed by Costa Cruise Lines, N.V., LLC by Costa Cruise Lines, N.V., LLC (Scarry, Brian) (Entered: 07/28/2008)
08/11/2008	37	NOTICE by Costa Cruise Lines, N.V., LLC *of Filing Affidavit of Laurence A. Klutz* (Attachments: # 1 Exhibit)(Scarry, Brian) (Entered: 08/11/2008)
08/14/2008	38	MOTION for Extension of Time to File Response as to 35 Defendant's MOTION to Dismiss 31 Amended Complaint by Wanda Krupski. (Attachments: # 1 Text of Proposed Order)(Berlowitz, Jeffrey) (Entered: 08/14/2008)

Date Filed	#	Docket Text
08/14/2008	39	ORDER denying 38 Motion for Extension of Time to File Response to Defendant's Motion to Dismiss due to Plaintiff's failure to comply with Local Rule 7.1A3. Furthermore, pursuant to the CM/ECF Administrative Procedures, proposed orders shall be filed initially as an attachment to a motion, notice, or other filing; however, the final version of the proposed document must be e-mail to Judge Altonaga at altonaga@flsd.uscourts.gov. The final version of the proposed document shall be submitted by e-mail in WordPerfect or Word format. The e-mail line and the name of the attachment should include the case number, followed by a short description of the attachment (e.g., 00-CIV-00000 Order). Failure to follow the above outlined procedure may result in denial of the motion without prejudice. The CM/ECF Administrative Procedures may be viewed at http://www.flsd.uscourts.gov. (CMA) (Entered: 08/14/2008)
08/18/2008	40	ORDERPlaintiff is advised that she has until August 20, 2008 to file her opposition to the Motion

Date Filed	#	Docket Text
		to Dismiss. The failure to do so will result in the entry of an order granting the Motion by default. (CMA) (Entered: 08/18/2008)
08/20/2008	41	STIPULATION of Dismissal *With Prejudice* by Costa Cruise Lines, N.V., LLC. (Scarry, Brian) (Entered: 08/20/2008)
08/21/2008	42	ORDER granting 35 Motion to Dismiss; Defendant, Costa Cruise Lines, N.V., L.L.C. is dismissed with prejudice; the claims against Defendant, Costa Crociere S.p.A. remain. Signed by Judge Cecilia M. Altonaga on August 20, 2008. (ps1) (Entered: 08/21/2008)
09/03/2008	43	Defendant's MOTION to Dismiss 31 Amended Complaint by Costa Crociere, SPA. Responses due by 9/22/2008 (Attachments: # 1 Exhibit, # 2 Exhibit)(Scarry, Brian) (Entered: 09/03/2008)
09/05/2008	44	MOTION Adjournment of Mediation by Wanda Krupski. (Attachments: # 1 Order Adjourning Mediatin)(Berlowitz, Jeffrey) (Entered: 09/05/2008)
09/08/2008	45	ORDER granting 44 Motion to Adjourn Mediation; the parties

Date Filed	#	Docket Text
		have until December 1, 2008 to complete mediation and file a report. Signed by Judge Cecilia M. Altonaga on September 8, 2008. (ps1) (Entered: 09/08/2008)
09/10/2008	46	CERTIFICATE OF SERVICE by Wanda Krupski (Berlowitz, Jeffrey) (Entered: 09/10/2008)
09/15/2008	47	RESPONSE to Motion re 43 Defendant's MOTION to Dismiss 31 Amended Complaint filed by Wanda Krupski. Replies due by 9/25/2008. (Attachments: # 1 Exhibit Exhibits to Resp to Mot to Dismiss)(Berlowitz, Jeffrey) (Entered: 09/15/2008)
09/24/2008	48	REPLY to Response to Motion re 35 Defendant's MOTION to Dismiss 31 Amended Complaint *and Memorandum of Law in Suport of Defendant's Motion to Dismiss* filed by Costa Crociere, SPA. (Scarry, Brian) (Entered: 09/24/2008)
10/14/2008	49	Joint MOTION to Continue *Pretrial Scheduling Deadlines and Trial Date* by Costa Crociere, SPA. Responses due by 10/31/2008 (Attachments: # 1 Exhibit, # 2 Exhibit)(Scarry, Brian) (Entered: 10/14/2008)

Date Filed	#	Docket Text
10/21/2008	50	ORDER granting Defendant's 43 Motion to Dismiss; the Clerk is instructed to close this case and any pending motions are denied as moot. Signed by Judge Cecilia M. Altonaga on 10/21/2008. (ps1) (Entered: 10/21/2008)
10/29/2008	51	JUDGMENT in favor of the Defendant against the Plaintiff. Signed by Judge Cecilia M. Altonaga on 10/29/2008. (ps1) (Entered: 10/29/2008)
11/17/2008	52	NOTICE OF APPEAL by Wanda Krupski as to 50 Order on Motion to Dismiss, 51 Judgment, Filing fee $ 455.00, receipt number 990537. Within ten days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (abd) (Entered: 11/18/2008)
11/17/2008	54	NOTICE of filing Attorney Appearance by Wanda Krupski. (abd) (Entered: 12/03/2008)
11/18/2008		Transmission of Notice of Appeal,

Date Filed	#	Docket Text
		Docket Sheet and Order/ Judgment under appeal to US Court of Appeals re 52 Notice of Appeal (abd) (Entered: 11/18/2008)
12/01/2008	53	Notice of Receipt of NOA Transmittal Letter from USCA on 11/21/2008 re USCA Case Number:08-16569-J for 52 Notice of Appeal, filed by Wanda Krupski. (abd) (Entered: 12/01/2008)
12/19/2008	55	TRANSCRIPT INFORMATION FORM by Wanda Krupski re 52 Notice of Appeal,. 7/2/08 Pretrial Proceeding transcript. Order placed by Jeffrey S. Berlowitz. (Berlowitz, Jeffrey) (Entered: 12/19/2008)
12/19/2008	56	COURT REPORTER ACKNOWLEDGMENT re 52 Notice of Appeal. Court Reporter: Barbara Medina. Phone: 305-523-5518. Estimated filing date of transcript: 01/18/2009. USCA number: 08-16569-J. (bm) (Entered: 12/19/2008)
12/30/2008	57	TRANSCRIPT of Motion for Summary Judgment held on 07/02/2008 before Judge Cecilia M. Altonaga. Re: 52 Notice of

Date Filed	#	Docket Text
		Appeal. Court Reporter: Barbara Medina. Phone: 305-523-5518. 1-27 pages. Transcript may be viewed at the court public terminal or purchased by contacting Barbara Medina before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 1/20/2009. Redacted Transcript Deadline set for 1/30/2009. Release of Transcript Restriction set for 3/30/2009. (bm) (Entered: 12/30/2008)
12/30/2008	58	TRANSCRIPT NOTIFICATION - Transcript ordered on: 12/17/2008 by Jeffrey S. Berlowitz, Esq. has been filed by Court Reporter, Barbara Medina. Phone: 305-523-5518. (bm) (Entered: 12/30/2008)
03/23/2009	59	CERTIFICATE of Readiness transmitted to USCA re 52 Notice of Appeal, filed by Wanda Krupski; USCA: 08-16569-JJ (hh) (Entered: 03/24/2009)
03/23/2009	60	Certified and Transmitted Record on Appeal to US Court of Appeals Consisting of (2) Volumes of Pleadings, (1) Volume of Transcript re 52 Notice of Appeal,

Date Filed	#	Docket Text
		(hh) (Entered: 03/24/2009)
04/13/2009	61	ACKNOWLEDGMENT OF RECEIPT FROM USCA re 52 Notice of Appeal, receipt of: COR/ROA date received by USCA 03/30/2009 USCA number 08-16569-JJ (amb) (Entered: 04/13/2009)
07/28/2009	62	MANDATE of USCA (certified copy) AFFIRMING judgment of the district court with court's opinion; re 52 Notice of Appeal, filed by Wanda Krupski ; Date Issued: 7/24/2009 ; USCA Case Number: 08-16569-JJ (mc) (Entered: 07/28/2009)
07/30/2009	63	Appeal Record Returned (Miami/Records) consisting of (2)Volumes of Pleadings (copies) and (1)Volume of Transcript; re 52 Notice of Appeal. USCA# 08-16569-JJ (mc) (Entered: 07/30/2009)

United States Court of Appeals
for the Eleventh Circuit

08-16569-JJ

Wanda Krupski v. Costa Cruise Lines

File Date	Entry
11/21/2008	Fee Status: Paid (11/21/08) for Wanda Krupski
11/24/2008	DKT2 (Docketing Notice) issued. To:Mark Roy Bendure; c:Brian T. Scarry; c:David J. Horr; c:Jeffrey S. Berlowitz; c:Matthew L. Turner; c:Steven M. Larimore
11/24/2008	Probable Jurisdiction Noted:
11/25/2008	CLK1 (Letter to district court - Forwarding DC Ntc. of Appr) issued. To:Steven M. Larimore
11/26/2008	Appearance Form Submitted.
12/01/2008	Certificate of Interested Persons and Corporate Disclosure Statement: (Atty: Stephanie H. Wylie)
12/05/2008	E-CIP Filed
12/05/2008	E-CIP Filed.
12/15/2008	Appearance Form Submitted.
12/15/2008	Civil Appeal Statement Form: (Atty: Mark Roy Bendure)

12/15/2008	Certificate of Interested Persons & Corporate Disclosure Statement: (Atty: Mark Roy Bendure)
12/15/2008	Transcript Order Form - Hrg. 07/02/08: (Atty: Mark Roy Bendure)
12/19/2008	Court Reporter Financial Arrangements:
12/30/2008	Transcript Filed in D.C. - 7/2/08 hearing:
01/14/2009	Court Reporter Acknowledgement - 7/2/08 hearing:
01/14/2009	Notice of Transcript Filing Rec. from Ct. Rptr.:
01/15/2009	Briefing Notice Issued
01/15/2009	BR1CIV (Letter confirming brief due date) issued. To:Mark Roy Bendure; c:Stephanie H. Wylie
02/10/2009	E-Brief Tendered: Appellant by Mark Roy Bendure
02/10/2009	Appellant Brief Filed: (Atty: Mark Roy Bendure)
02/10/2009	Record Excerpts: (Atty: Mark Roy Bendure)
03/16/2009	DELETED: E-Brief Tendered: Reply (2) by Stephanie H. Wylie. The subject ebrief was rejected because it did not match the description selected when it was uploaded.

03/16/2009	E-Brief Tendered: Appellee by Stephanie H. Wylie
03/17/2009	Appellee Brief Filed: (Atty: Stephanie H. Wylie)
03/18/2009	Appearance Form Submitted.
03/18/2009	BR7 (Brief deficiency letter) issued. To:David J. Horr; c:Mark Roy Bendure; c:Stephanie H. Wylie
03/23/2009	Attorney Changed for: Costa Crociere, SPA From: David J. Horr (305) 670-2525 stephaniew@admiral-law.com To: Wylie, Stephanie H..
03/27/2009	E-Brief Tendered: Reply by Mark Roy Bendure
03/30/2009	Certificate of Readiness
03/30/2009	Record on Appeal
04/01/2009	Reply Brief Filed: (Atty: Mark Roy Bendure)
06/22/2009	Judgment Entered
06/22/2009	OPIN1A (Notice of issuance of opinion) issued. costs taxed against the appellant. c:Brown, Stephen T.; c:Cecilia M. Altonaga; c:David J. Horr; c:Mark Roy Bendure; c:Stephanie H. Wylie
06/22/2009	Opinion Issued
07/24/2009	Record and Exhibits Returned to District Court: 3 v. of roa.

07/24/2009	CASE CLOSED-Mandate Issued
07/24/2009	Mandate Issued
07/24/2009	MDT1 (Letter issuing mandate) issued. To:Steven M. Larimore; c:Brown, Stephen T.; c:David J. Horr; c:Mark Roy Bendure; c:Stephanie H. Wylie
09/21/2009	Notice of Filing Certiorari #09-337: (Atty: Mark Roy Bendure)
01/25/2010	Certiorari Granted #09-337, The brf of petitioner is due 2/25/10, respondent's brf is due 3/25/10 and a reply brf if any is to be filed in accordance to the court rules.: (Atty: Mark Roy Bendure)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Ft. Lauderdale Division

Case Number 08-60152

[Filed February 1, 2008]

WANDA KRUPSKI, a single person,	)
	)
Plaintiff,	)
	)
v.	)
	)
COSTA CRUISE LINES, N.V., L.L.C., d/b/a COSTA CRUISE LINES, a foreign corporation (Netherland Antilles),	)
	)
Defendant.	)
	)

COMPLAINT AND JURY DEMAND

Plaintiff, WANDA KRUPSKI, by and through her undersigned attorneys, sues Defendant, COSTA CRUISE LINES, N.V., L.L.C., d/b/a COSTA CRUISE LINES, and alleges as follows:

1. That this is a cause of action for damages in excess of Seventy-Five Thousand ($75,000.00) Dollars exclusive of costs, interest and attorney fees, the sum specified by 28 U.S.C. §1332.

2. At all times material hereto, the Plaintiff, WANDA KRUPSKI (hereinafter referred to as

"Plaintiff") resided in the City of Detroit, County of Wayne, State of Michigan.

3. At all times material hereto, the Defendant, COSTA CRUISE LINES, N.V., L.L.C., d/b/a COSTA CRUISE LINES (hereinafter referred to as "Defendant") is registered to do business in Florida with an address of 200 South Park Road, Suite 200, Hollywood, Florida, 33021, but is a foreign corporation.

4. Defendant is a Netherland Antilles Limited Liability Company.

Subject Matter Jurisdiction

5. This Court has subject matter jurisdiction for this claim pursuant to 28 U.S.C. §1332 in Diversity as the parties are completely diverse, and 28 U.S.A §1333(1) Saving to Suitors and in the alternative, 28 U.S.C. §1333, and rule 9(h) of the Federal Rules of Civil Procedure and under the General Maritime Law of the United States.

6. Plaintiff, WANDA KRUPSKI was a paying passenger on Defendant's vessel *COSTA MAGICA*.

Venue, Personal Jurisdiction, and General Allegations

7. That on or about February 21, 2007, the Defendant was a foreign corporation registered to do business in the State of Florida and maintained a permanent office for the transaction of business in Broward County, Florida.

8. Venue is proper in Broward County as the Defendant's passenger ticket contains a forum selection, which requires any action to be brought exclusively in the United States District Court for the Southern District of Florida located in Broward County, Florida.

9. Plaintiff has complied with all pre-suit requirements of the passenger ticket contract by providing COSTA CRUISE LINES with a written detailed description of the circumstances of the incident that is the subject of this lawsuit in a letter dated July 2, 2007, mailed to COSTA CRUISE LINES at COSTA CRUISE LINES' principal place of business.

10. On or about February 21, 2007, Defendant, COSTA CRUISE LINES owned, operated, managed, supervised and controlled the ocean-going passenger vessel known as the *COSTA MAGICA*.

11. On or about February 21, 2007, Plaintiff was a fare-paying passenger aboard the *COSTA MAGICA* during a planned week-long Caribbean cruise that departed from and returned to Port Everglades, Florida.

12. While attending a performance at the Theatre Deck 3 on February 21, 2007, Plaintiff tripped and fell over a camera cable that was left in a dangerous condition in the walkway where the passengers were required to walk to enter and exit the Theatre. Due to the fact that the cable was close to the chair and she was unable to see the cable because of the light in the Theatre, Plaintiff tripped and fell and suffered a fracture of her right femur which required surgery, extensive inpatient and homebound

rehabilitation, and has left her with physical and emotional injuries.

13. On or about February 21, 2007 and for a considerable period of time prior thereto, the Defendant, by and through the acts of it's duly authorized agents, servants and employees and in the conduct and operation of its business, did hold out and extend to it's invitees an implied and expressed invitation to enter upon the property of COSTA CRUISE LINES, and specifically the vessel, COSTA MAGICA.

14. At all times relevant to this case, the defendant expressly and/or impliedly invited the plaintiff onto and about the ship, and thereby assumed the duty to use due care and caution to keep and maintain the ship, common areas and aisle ways in a safe condition to avoid causing injury to the plaintiff.

15. Defendant owed Plaintiff, WANDA KRUPSKI, who was rightfully in and about the ship, the duty to exercise reasonable care and caution in repair and maintenance of the ship, and to avoid creating any hazardous, dangerous conditions of which the defendant knew, or through the exercise of reasonable care should have known, so as not to cause injury or damage to plaintiff and others rightfully occupying the ship.

16. It was the duty of the defendant to exercise due care for the rights and safety of persons invited on the ship, and particularly, it was the duty of the defendant not to cause the public areas to be left in a dangerous and unsafe condition.

COUNT I
NEGLIGENCE OF COSTA CRUISE LINES, N.V.

Plaintiff incorporates paragraphs 1 through 16 as if fully set forth and alleges the following:

17. COSTA CRUISE LINES owed a duty to its passengers, including WANDA KRUPSKI, to exercise reasonable care under the circumstances, and specifically to equip and operate its vessel, the *COSTA MAGICA*, in a reasonable and safe manner, including any and all public areas on the vessel, specifically the aisle way in Theatre Deck 3 which is the subject of this Complaint.

18. COSTA CRUISE LINES breached its duty of care to WANDA KRUPSKI and was negligent and careless in at least the following ways:

a. Failing to provide safe ingress and egress in Theatre Deck 3;

b. Failing to provide warning to passengers of hidden perils in Theatre Deck 3;

c. Failing to properly set-up the cameras and other necessary equipment in the theatre so that passengers would not trip;

d. Failing to warn passengers that there were cables and other impediments in the aisle where they would be exiting the theatre;

e. Failing to properly maintain and keep the subject aisle in a reasonably safe condition for it passengers;

f. Failing to properly place and secure the necessary cords and cables in the theatre so that they would not present a trip hazard;

g. Failing to follow the cruise lines' own policies and procedures regarding setting up the theatre;

h. Creating the dangerous condition that existed in the aisle of theatre number 3;

i. Failing to use due care in setting up the equipment in the theatre;

j. Failing to remedy a hazardous condition of which it knew or should have known;

k. Failing to have proper lightening in the theatre at the time that patrons exited;

l. Failing to have polices and procedures in place which would provide for a safe method by which patrons could exit the theatre;

m. Failing to develop, maintain and utilize reasonable and proper safety policies, procedures and protocols to detect dangerous conditions of the subject aisle;

m. Failing to properly train and instruct the employees to set up the theatre, inspect for dangerous or hazardous conditions, and/or remedy any dangerous or hazardous conditions that may exist

19. As a direct and proximate cause of the above described carelessness and negligence of COSTA CRUISE LINES, the Plaintiff, WANDA KRUPSKI, was injured, suffered a fracture of her right femur, endured pain and suffering, suffered a physical impairment and/or disability, mental anguish, loss of capacity for the enjoyment of life, the aggravation of preexisting conditions, inconvenience, permanent disability, mental anguish and incurred necessary medical expenses for the treatment of her injuries. These injuries are permanent and continuing in nature. Plaintiff will suffer these losses and impairments in the future.

WHEREFORE, Plaintiff, WANDA KRUPSKI demands judgment for damages against the Defendant, COSTA CRUISE LINES in excess of the minimal jurisdictional limits of this Court, as well as pre-judgment and post-judgment interest, costs and attorney fees incurred in bringing this action, along with any allowable punitive damages.

JURY DEMAND

Plaintiff demands a trial by jury.

DATED this 1st day of February, 2008.

PHILLIPS, CANTOR & BERLOWITZ, P.A.
Presidential Circle
4000 Hollywood Boulevard, Suite 375-S
Hollywood, Florida 33021
Telephone: (954) 966-1820
Facsimile: (954) 414-9309
jberlowitz@phillipslawyers.com

BY: /s/

JEFFREY S. BERLOWITZ, ESQ.
Fla. Bar No. 963739

and

TURNER & TURNER, P.C.
Matthew L. Turner, Esq.
(P48706, pending admission pro hac vice)
26000 W. 12 Mile Road
Southfield, MI 48034
Telephone: (248) 355-1727
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Ft. Lauderdale Division

CASE NO.: 08-60152-CIV-ALTONAGA/TURNOFF

[Filed February 25, 2008]

WANDA KRUPSKI, a single person,,	)
	)
Plaintiff,	)
	)
vs.	)
	)
COSTA CRUISE LINES, N.V., L.L.C., d/b/a COSTA CRUISE LINES, a foreign corporation (Netherlands Antilles),	)
	)
Defendant.	)
	)

ANSWER

COMES NOW, the Defendant, denominated by the Plaintiff as COSTA CRUISE LINES N.V., L.L.C., by and through its undersigned counsel and pursuant to Rule 12 and the other pertinent Federal Rules of Civil Procedure, Answers the Plaintiff's Complaint and jury demand, stating as follows:

1. Defendant denies each and every allegation of the Plaintiff's Complaint not otherwise expressly admitted herein.

2. Defendant is without sufficient knowledge and information to form a belief as to the veracity of

the allegations set forth in Paragraphs 1 and 2 and therefore denies same.

3. Defendant admits the allegations set forth in Paragraphs 3, 4 and 5 of the Complaint.

4. Defendant admits that WANDA KRUPSKI was a passenger aboard the *Costa Magica* as alleged in Paragraph 6. Defendant denies that it was involved with the operation, ownership or management of the vessel *Costa Magica*.

5. Defendant admits the allegations set forth in Paragraph 7 and 8 of the Complaint.

6. Defendant denies the allegations set forth in Paragraphs 9 and 10.

7. Defendant admits as alleged in Paragraph 11, that on or about February 21, 2007 the Plaintiff was a fare paying passenger aboard the *Costa Magica* on a cruise that departed from Port Everglades, Florida and was scheduled to return there.

8. Defendant is without sufficient knowledge and information to form a belief as to the veracity of the allegations set forth in Paragraph 12 and therefore denies same.

9. Defendant denies the allegations set forth in Paragraphs 13, 14, 15 and 16 and demands strict proof thereof.

10. Defendant denies the allegations set forth in Paragraph 17, 18 (and subparts) and 19.

11. Defendant affirmatively avers that at all times material hereto, the Plaintiff's travel aboard the *Costa Magica* as a fare paying passenger was governed by the terms and conditions of the Passage Ticket Contract issued to the Plaintiff. A copy of that Passage Ticket Contract is attached hereto as Exhibit "A."

Pursuant to the terms of the Passage Ticket Contract, the undertaking to transport Plaintiff aboard the *Costa Magica* as carrier was by Costa Crociere S.p.A., an Italian corporation.

Moreover, pursuant to Paragraph 3 of the Passage Ticket Contract, Defendant Costa Cruise Lines N.V. is clearly identified and communicated to the Plaintiff to be a sales and marketing agent for the carrier/vessel operator, Costa Crociere S.p.A. Under these circumstances, the Defendant Costa Cruise Lines N.V. does not occupy a status upon which substantive liability to the Plaintiff for the claims alleged can properly be premised pursuant to the General Maritime Law of the United States.

Dated: February 25, 2008
Miami, Florida

Respectfully submitted,

/s/ David J. Horr

DAVID J. HORR (310761)
davidh@admiral-law.com
HORR, NOVAK & SKIPP, P.A.
Attorneys for Defendant
Datran Building, Suite 1104
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Miami, FL33156

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Telefax: (305) 670-2526

* * *

[Certificate of Service and Service List Omitted in Printing of this Appendix]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Ft. Lauderdale Division

CASE NO.: 08-60152-CIV-ALTONAGA/TURNOFF

[Filed May 6, 2008]

WANDA KRUPSKI, a single person,	)
	)
Plaintiff,	)
	)
vs.	)
	)
COSTA CRUISE LINES, N.V., L.L.C., d/b/a COSTA CRUISE LINES, a foreign corporation (Netherland Antilles),	)
	)
Defendant.	)

AFFIDAVIT OF LAURENCE A. KLUTZ

Laurence A Klutz. being first duly sworn under oath, states as follows:

1. My name is Laurence A. Klutz. I am over 21 years of age. I make this affidavit upon personal knowledge.

INTERNATIONAL RISK SERVICES, INC.

2. I am the President of International Risk Services, Inc. ("I.R.S.I."), a consulting company providing services to various clients throughout the world. At all times material I.R.S.I. contracted with

Costa Cruise Lines N.V. L.L.C. (CCL N.V.) to provide claim administration services to facilitate the handling of claims asserted by passengers on certain vessels owned and operated by Costa Crociere S.p.A.

3. I.R.S.I. is an independent contractor of CCL N.V. I am not currently nor have I ever been an employee of CCL N.V. I am not authorized to accept service of process on behalf of CCL N.V. or Costa Crociere S.p.A. I have been authorized by CCL N.V. to execute this affidavit.

4. In my capacity as President of I.R.S.I. I have acquired personal knowledge of certain particulars of CCL N.V.'s organization and its business relationship with Costa Crociere S.p.A. I also have personal knowledge of the type, terms and provisions of the documents issued to passengers on Costa Crociere S.p.A.'s vessels, including the Travel Documents Booklet and General Conditions of Passage Ticket Contract ("GCPTC").

COSTA CRUISE LINES N.V. L.L.C.

5. CCL N.V. is organized under the law of the Netherlands Antilles and has its principal office at Venture Corporate Center II, 200 South Park Road, Suite 200, Hollywood, Florida 33021-8541.

6. CCL N.V. operates as a sales and marketing agent in North America for vessels operated by Costa Crociere S.p.A. a separate Italian company. CCL N.V. does not own or operate any ships.

7. CCL N.V. is not authorized to accept service of process on behalf of Costa Crociere S.p.A.

COSTA CROCIERE S.p.A.

8. Costa Crociere S.p.A. is an Italian company with its headquarters in Genoa, Italy. Costa Crociere S.p.A.'s offices are located at Via XII Ottobre 2-16121, Genoa, Italy.

9. At all times material Costa Crociere S.p.A. owned and operated the cruise ship COSTA MAGICA.

THE UNDERLYING LITIGATION

10. Plaintiff, Wanda Krupski, has alleged she sustained personal injury aboard the COSTA MAGICA on or about February 21, 2007, due to the negligence of CCL N.V.

11. Plaintiff booked a cruise aboard the COSTA MAGICA. The cruise departed from Port Everglades, Florida on February 18, 2007, and plaintiff was a fare paying passenger and lawfully aboard the COSTA MAGICA.

12. On February 21, 2007, plaintiff was aboard the COSTA MAGICA when she allegedly sustained injury in a fall within the theater (deck three) aboard the COSTA MAGICA. On February 1, 2008, plaintiff filed a Complaint and Jury Demand within the United States District Court for the Southern District of Florida, Case No.: 08-60152 Civ-Altonaga/Turnoff.

13. On February 4, 2008, the Summons and Complaint were served upon defendant, CCL N.V. by serving its registered agent: C. T. Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324.

14. Plaintiff booked her cruise on the COSTA MAGICA on May 6, 2006 and made a final payment for the cruise on December 10, 2006. Plaintiff's passage contract was issued pursuant to Booking No. 3250312. On January 4, 2007 CCL N.V. mailed plaintiff's travel documents from Milan, Italy to plaintiff's travel agent Quest Travelers 102 Chinkapin Court Easley South Carolina 29642, via United Parcel Service Package #1ZR2700R6646305902. See "Booking Details" attached to this Affidavit as Exhibit "A." The travel documents include a Cover Page and the General Conditions of Passage Ticket Contract ("GCPTC"). An exemplar copy of the Cover Page and GCPTC issued to plaintiff is attached to this Affidavit as Exhibit "B." The language on the exemplar Cover Page is identical to the Cover Page issued to plaintiff with the sole exception of the number of pages referred to within the "Important Notice!" portion. The attached exemplar 2008 Cover Page references 14 pages within the GCPTC ("pages A1 to A14 of this booklet") whereas the 2007 Cover Page issued to plaintiff made reference to a total of 11 pages ("pages A1 to A11 of this booklet") within the GCPTC. An identical copy of the GCPTC issued to plaintiff is attached to this Affidavit within Exhibit "B."

15. The following text appears on the Cover Page of the travel documents booklet issued to plaintiff:

> IMPORTANT NOTICE!
>
> PLEASE READ THIS TICKET IN FULL UPON RECEIPT AS IT LIMITS YOUR LEGAL RIGHTS In accepting this ticket, Guests agree to be bound by all its terms including its limitations of the Guest's

rights. Each Guest should carefully examine the ticket, especially the section noted as "GENERAL CONDITIONS OF PASSAGE TICKET CONTRACT" located on pages A1 to A11 of this booklet.

16. The following text appears in bold print on the first page of the "GENERAL CONDITIONS OF PASSAGE TICKET CONTRACT" (GCPTC) issued to plaintiff:

> **THIS IS YOUR PASSAGE TICKET CONTRACT. READ IT CAREFULLY AS SOON AS YOU RECEIVE IT. IT IMPOSES OBLIGATIONS AND LIMITS YOUR RIGHTS.**
>
> **By accepting or using this ticket, you, the Passenger, acknowledge, accept and agree to all of its terms and conditions. Certain provisions are highlighted to call your attention to them but all provisions are important and binding upon you. The CARRIER undertakes to transport the Passenger and the Passenger's baggage only on the following basis ,which the Passenger acknowledges and undertakes to comply with fully. (Exhibit "B" Page A1).**

17. The GCPTC states within the section entitled **"DEFINITIONS OF TERMS USED IN THIS TICKET"** as follows:

> The word "CARRIER when used in this contract shall mean Costa Crociere S.p.A., an Italian corporation, and all vessels and other ships owned, chartered, operated, marketed or provided by Costa Crociere S.p.A., and all officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns on board said vessel, add the manufactures of said vessel and all their component parts. (Exhibit "B" Page A1)

18. CCL N.V. was not a party to the passage ticket contract. CCL N.V. is not the "CARRIER." CCL N.V. was fully disclosed in Section 3 of the CGPTC as "a sales and marketing agent for the CARRIER and the issuer of this Passage Ticket Contract." (Exhibit "B" page A3).

19. Costa Crociere S.p.A. undertook to transport plaintiff on the COSTA MAGICA on February 18, 2007, subject to the terms and conditions set forth within the GCPTC. The GCPTC were contained in the attached exemplar GCPTC. (Exhibit "B").

20. Section 25 of the GCPTC states as follows:

> This contract constitutes the entire agreement between the Passenger and the CARRIER. There are no other representations undertaking or warranties of the CARRIER, written or oral, except those expressly stated herein and this Contract may not be modified except in writing signed by the CARRIER. (Exhibit "B" Page A11).

FURTHER AFFIANT SAYETH NOT.

/s/
Laurence A. Klutz

STATE OF Florida)
) ss
COUNTY OF Broward)

Before me this day appeared LAURENCE A. KLUTZ, personally known to me or who has produced _____ as identification, and being first duly sworn, deposes and says that he executed the foregoing and he acknowledges that he executed same freely and voluntarily as his own act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and seal at _____, this 1 day of ~~April~~ May, 2008.

/s/
Notary Public, State of Florida
at Large

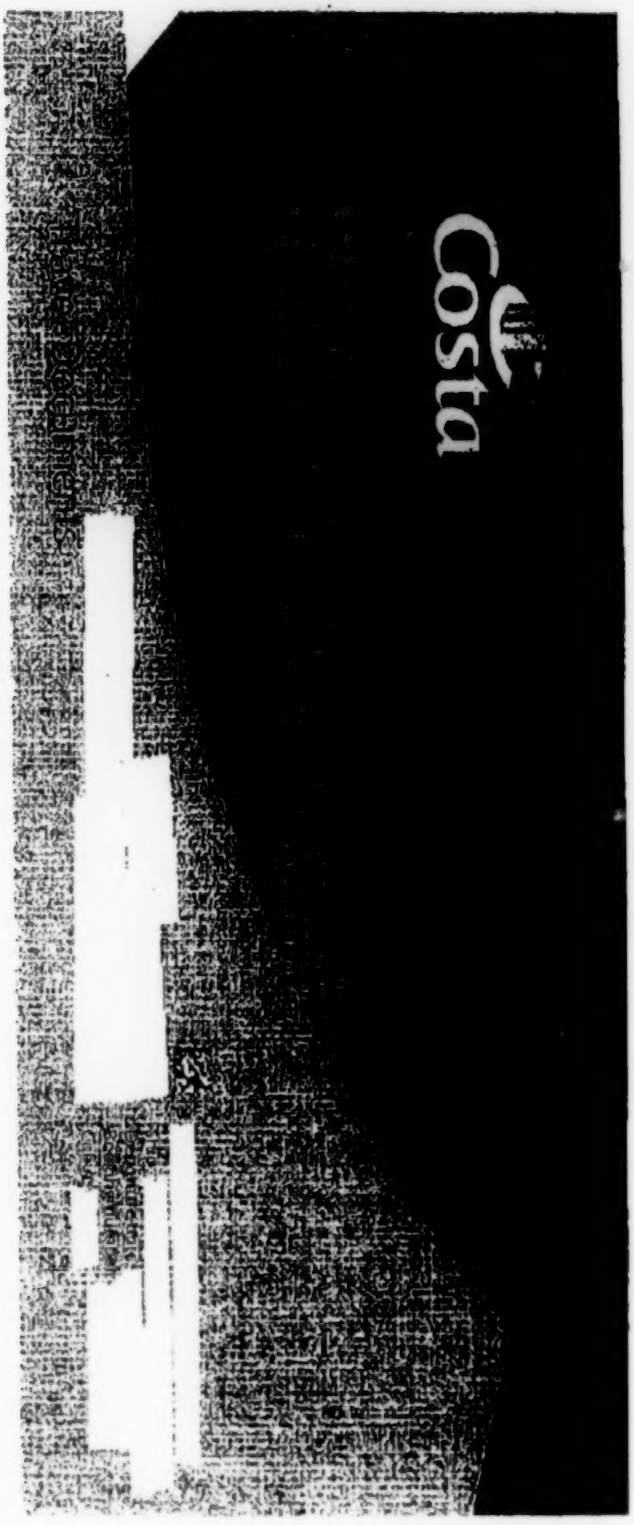
My Commission Expires:

[SEAL] (407) 398-0153	JENNIFER DOMINGUEZ MY COMMISSION # DD722304 EXPIRES October 04, 2011 FloridaNotaryService.com

EXHIBIT B, in part

COSTA TICKET COVER

[see next foldout page]



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 08-60152-CIV-ALTONAGA/Turnoff

[Filed June 13, 2008]

WANDA KRUPSKI, a single person,	)
	)
Plaintiff,	)
	)
vs.	)
	)
COSTA CRUISE LINES, NC, LLC, d/b/a COSTA CRUISE LINES, a foreign corporation (Netherland Antilles),	)
	)
Defendant.	)

PHILLIPS, CANTOR & BERLOWITZ, P.A.
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Fax: (305) 670-2526
Attorneys for Defendant

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR LEAVE TO AMEND COMPLAINT TO ADD COSTA CROCIERE, S.p.A. AS A DEFENDANT

NOW COMES, the Plaintiff, WANDA KRUPSKI, (hereinafter "Plaintiff"), by and through her undersigned counsel and in response to Defendant's Motion for Summary Judgment, and for her Motion for Leave to Amend her Complaint to Add Costa Crociere, S.p.A. as a Defendant, respectfully requests that this Honorable Court DENY Defendant's motion and GRANT Plaintiff's motion on the grounds set forth in the attached Brief in Support.

BRIEF IN SUPPORT

I. Introduction and Factual Summary

This case arises from the Defendant's negligence causing injuries to Plaintiff while Plaintiff was a passenger aboard the cruise vessel COSTA MAGICA. While attending a performance at the Theatre Deck 3 on February 21, 2007, Plaintiff tripped and fell over a camera cable that was left in a dangerous condition in the walkway where the passengers were required to walk to enter and exit the Theatre. Due to the fact that the cable was close to the chair and she was unable to see the cable because of the light in the Theatre, Plaintiff tripped and fell and suffered a fracture of her right femur which required surgery, extensive inpatient and homebound rehabilitation, and has left her with physical and emotional injuries.

In performing its initial investigation, Plaintiff's counsel reviewed the "Travel Documents" packet supplied to Plaintiff by Costa Cruise Lines. At the outset, it is imperative to note that on the second page of the "Travel Documents" it states:

Costa Cruise Lines N.V.
200 South Park Road,
Suite 200
Hollywood, FL 33021-8541

(Exhibit 1)

In or around June 2007, in performing its pre-litigation due diligence, Plaintiff's counsel performed internet research regarding Costa Cruise Lines. On the Costa Cruise Lines website, located at

www.costacruise.com, it lists "Costa offices worldwide" **(Exhibit 2)**. The only United States office listed by the Defendant on its website was, at that time, and is currently:

U.S.A
Costa Cruise Lines, N.V.
Venture Corporate Center II
200 South Park Road, Suite 200
Hollywood, FL 33021-8541-U.S.A.
http://www.costacruises.com/

(Exhibit 2)

Next, Plaintiff's counsel went to the Florida Department of State Division of Corporations website located at the URL: www.sunbiz.org. Plaintiff's counsel performed a search for Costa Cruise Lines. The only ACTIVE entity name returned from the search was COSTA CRUISE LINES N.V. L.L.C. (CCL N.V.) **(Exhibit 3)**. Clicking on the COSTA CRUISE LINES N.V. L.L.C. link returned the following information:

Foreign Limited Liability Company

COSTA CRUISE LINES N.V. L.L.C.
***
Principal Address

200 SOUTH PARK ROAD, STE. 200
HOLLYWOOD FL 33021-8541

Mailing Address

200 SOUTH PARK ROAD, STE. 200
HOLLYWOOD FL 33021-8541

Registered Agent Name & Address

C T CORPORATION SYSTEM
1200 SOUTH PINE ISLAND ROAD
PLANTATION FL 33324 US

(Exhibit 4)

On July 2, 2007, less than five (5) months after the incident giving rise to this case, Plaintiff's counsel notified the Defendant of Plaintiff's claims (**Exhibit 5**). On July 9, 2007, Plaintiff received a response from the Defendant's Claims Administrator (**Exhibit 6**). Nowhere in Defendant's response did the Claims Administrator indicate that COSTA CRUISES LINES, N.V. L.L.C. was an improper party to the anticipated litigation.

While Plaintiff reasonably believes and maintains that CCL N.V. is a proper party to this case, it has been brought to Plaintiff's attention that Costa Crociere, S.p.A. is a proper defendant to this lawsuit. At this point, it is too early to determine whether or not CCL N.V. should be dismissed from the lawsuit. CCL N.V. and Costa Crociere, S.p.A. are intimately intertwined businesses. Where CCL N.V. ends, and Costa Crociere, S.p.A. begins, is still not entirely clear. Defendant CCL N.V.'s motion for summary judgment is premature and Plaintiff should be permitted to conduct some initial discovery to determine whether CCL N.V. is a proper party. Therefore, Defendant CCL N.V.'s motion for summary judgment should be denied and Plaintiff should be permitted to amend her pleadings to add Costa Crociere, S.p.A. as a defendant.

At this stage of the litigation, it is too early to tell whether or not CCL N.V. is a proper party to this case. For example, as cited by Defendant CCL N.V., under the general conditions of passage ticket contract (GCPTC) "CARRIER" includes:

> "All officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns on board said vessel..."

(Defendant's Motion for Summary Disposition, pg. 6)

There is no question that CCL N.V. is an agent of Costa Crociere, S.p.A. The Defendant freely admits that it is a sales and marketing agent for the CARRIER (Defendant's Motion for Summary Disposition, pg. 6). At this point in time, it is simply too early to tell whether there is a genuine issue of material fact as to whether CCL N.V. maintained personnel on board Costa Majica. If there were employees or agents of CCL N.V. on board, then by the express terms of the GCPTC, CCL N.V. would fall under the definition of "CARRIER".

Further, the express language of the GCPTC contemplates liability for CCL N.V. The ticket contract states:

> "All of the defenses, limitations and exceptions of whatever kind relating to the responsibility and liabilities of the CARRIER that may be invoked by the CARRIER by virtue of this Contract or by law are fully extended to and may also be invoked by all other person who may act on behalf of the CARRIER or on whose

> behalf the CARRIER may act. Such person may include without limitation (i) the CARRIER's parents, subsidiaries, affiliates, successors, assigns, representatives, agents, employees, servants, concessionaires and contractors...and (iii) Costa Cruise Lines, N.V..."

By the express terms of the contract, Costa Cruise Lines, N.V. is a party to the contract. As stated above, it is too early at this point in time to determine whether CCL N.V. is a proper party to this lawsuit. Therefore, Defendant's Motion for Summary Disposition must be denied.

II. Standard of Review

A. Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WSB-TV v. Lee, 125 F.R.D. 191, 192 (N.D. Ga. 1988)

B. Motion for Leave to Amend

"The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. The Rules themselves provide that they are to be construed "to secure the

just, speedy, and inexpensive determination of every action.

Rule 15 (a) declares that leave to amend "**shall be freely given when justice so requires**"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), paras. 15.08, 15.10. "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, **he ought to be afforded an opportunity to test his claim on the merits**. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be freely given." Foman v. Davis, 371 U.S. 178, 181-182 (1962) (emphasis added) (citations omitted).

III. Statement of Material Facts in Opposition

1. Plaintiff admits that she sustained personal injuries aboard the COSTA MAGICA on or about February 21, 2007, due to the negligence of the Defendant. Plaintiff's claims in this case can be found in her Complaint.

2. Plaintiff admits that she booked a cruise aboard the COSTA MAGICA. The cruise departed from Port Everglades, Florida and Plaintiff was fare paying passenger and lawfully aboard the COSTA MAGICA. Further, the travel documents provided to Plaintiff were issued by Defendant Costa Cruise Lines N.V.

3. Plaintiff admits that on February 21, 2007, while aboard the COSTA MAGICA, she sustained injury in a fall as a result of the Defendant's negligence. Plaintiff admits that her original Complaint was filed February 1, 2008, less than five (5) months ago.

4. Plaintiff admits that she served the Summons and Complaint upon the Defendant on February 4, 2008. As stated above, on the second page of the "Travel Documents" it states:

Costa Cruise Lines N.V.
200 South Park Road,
Suite 200
Hollywood, FL 33021-8541

(Exhibit 1)

The only United States office listed by the Defendant on its website was, at that time, and is currently:

U.S.A
Costa Cruise Lines, N.V.
Venture Corporate Center II
200 South Park Road, Suite 200
Hollywood, FL 33021-8541-U.S.A.
http://www.costacruises.com/

(Exhibit 2)

The Florida Department of State Division of Corporations website lists the following for COSTA CRUISE LINES N.V. L.L.C.:

Foreign Limited Liability Company

COSTA CRUISE LINES N.V. L.L.C.
***

Principal Address

200 SOUTH PARK ROAD, STE. 200
HOLLYWOOD FL 33021-8541

Mailing Address

200 SOUTH PARK ROAD, STE. 200
HOLLYWOOD FL 33021-8541

Registered Agent Name & Address

C T CORPORATION SYSTEM
1200 SOUTH PINE ISLAND ROAD
PLANTATION FL 33324 US

(Exhibit 4)

All public information provided by CCL N.V. and Costa Crociere, S.p.A. leads to a reasonable determination that CCL N.V. is a proper party to this case.

5. Plaintiff admits that the General Conditions of Passage Ticket Contract (GCPTC), attached to Defendant's motion, is an black and white Xerox copy of the GCPTC issued to her by Defendant CCL N.V.

6. The document speaks for itself.

7. The document speaks for itself.

8. The document speaks for itself.

9. Denied. At this stage, it is too early to determine whether CCL N.V. falls under the definition of "CARRIER" in the GCPTC. Defendant admits that it is an agent of Costa Crociere, S.p.A. Again, due to the intimately intertwined nature of these entities, it is impossible to determine this issue without further discovery.

10. As stated throughout, it is too early to determine whether CCL N.V. falls under the definition of CARRIER in the GCPTC.

11. The document speaks for itself.

IV. Memorandum of Law

A. Plaintiff Should Be Granted Leave To File Her Amended Complaint.

Federal Rule of Civil Procedure 15(a)(2) states in pertinent part:

> "A party may amend its pleading only with the opposing party's written consent or the court's leave. **The court should freely give leave when justice so requires.**"

In the present case, there is absolutely no reason to prohibit Plaintiff from Amending her Complaint to add Costa Crociere, S.p.A. as a defendant. No Defendant would suffer prejudice by Plaintiff's amendment adding Costa Crociere, S.p.A. This case was filed on February 1, 2008. It is still in the very initial stages of litigation. No discovery has taken place. Plaintiff's

amendment is not futile[1]. Therefore, Plaintiff should be granted leave to file her amended complaint.

Further, Defendant CCL N.V., throughout its Motion for Summary Judgment, argues that Costa Crociere, S.p.A. is a proper party to this lawsuit (See Defendant's Motion for Summary Judgment, pgs. 4-10). It appears that CCL N.V. does not object to the amendment adding Costa Crociere, S.p.A. as a defendant. Therefore, Plaintiff's motion to amend to add Costa Crociere, S.p.A. as a defendant should be granted.

B. Defendant CCL N.V.'s Motion For Summary Judgment Should Be Denied As It Is Too Early To Tell Whether Or Not CCL N.V. Is A Proper Defendant.

It generally is inappropriate for a court to rule on a summary judgment motion when the non-moving party has not been able to obtain discovery. See Fernandez v. Bankers Nat'l Life Ins. Co., 906 F.2d 559, 570 (11th Cir.1990); Snook v. Trust Co. of Georgia Bank, 859 F.2d 865, 870-71 (11th Cir.1988). Federal Rule of Civil Procedure 56(f) allows courts to defer ruling on summary judgment motions until the non-moving party has been able to conduct all

---

[1] It is Plaintiff's position that there are many arguments to be made for the fact that Plaintiff's amendment adding Costa Crociere, S.p.A. will relate back to the filing of Plaintiff's original Complaint. It is Plaintiff's position that these arguments are not ripe at this point and Plaintiff reserves the right to set forth these arguments as they become ripe and properly raised before the Court.

necessary discovery. Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1219 (11th Cir. Ga. 2000)

As previously stated, at this stage of the litigation, further discovery is required to tell whether or not CCL N.V. is a proper party to this case. For example, as cited by Defendant CCL N.V., under the general conditions of passage ticket contract (GCPTC) "CARRIER" includes:

> "All officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns on board said vessel..."

(Defendant's Motion for Summary Disposition, pg. 6)

There is no question that CCL N.V. is an agent of Costa Crociere, S.p.A. The Defendant freely admits that it is a sales and marketing agent for the CARRIER (Defendant's Motion for Summary Disposition, pg. 6). It is too early to determine whether or not there is a genuine issue of material fact as to whether CCL N.V. maintained personnel on board Costa Majica. If there were employees or agents of CCL N.V. on board, then by the express terms of the GCPTC, CCL N.V. would fall under the definition of "CARRIER". Furhter discovery including, but not limited to, requests for admissions and depositions are necessary to shed light on these issues.

Further, the express language of the GCPTC contemplates liability for CCL N.V. The ticket contract states:

> "All of the defenses, limitations and exceptions of whatever kind relating to the responsibility and liabilities of the CARRIER that may be invoked by the CARRIER by virtue of this Contract or by law are fully extended to and may also be invoked by all other person who may act on behalf of the CARRIER or on whose behalf the CARRIER may act. Such person may include without limitation (i) the CARRIER's parents, subsidiaries, affiliates, successors, assigns, representatives, agents, employees, servants, concessionaires and contractors...and (iii) Costa Cruise Lines, N.V..."

By the express terms of the contract, Costa Cruise Lines, N.V. is a party to the contract. As stated above, it is too early at this point in time to determine whether CCL N.V. is a proper party to this lawsuit. The intertwined nature of CCL N.V. and Costa Crociere, S.p.A. makes it impossible to discern, at this point, whether CCL N.V. is a proper party. Again, further discovery, including requests for production, requests for admissions, and depositions are necessary on this issue. Therefore, Defendant's Motion for Summary Disposition should be denied.

V. Relief Requested

Plaintiff respectfully requests that this Honorable Court DENY Defendant's motion and GRANT Plaintiff's motion for leave to add Costa Crociere, S.p.A. as a defendant to this case.

PHILLIPS, CANTOR & BERLOWITZ, PD
Presidential Circle
4000 Hollywood Boulevard, Suite 375-S

Hollywood, Florida 33021
Telephone: (954) 966-1820
Facsimile: (954) 414-9309
jberlowitz@phillipslawyers.com

/s/ Jeffrey S. Berlowitz, Esq.
Fla. Bar No. 963739

-and-

TURNER & TURNER, PC
26000 West 12 Mile Road
Southfield, Michigan 48034
Telephone: (248) 355-1727
Facsimile: (248) 355-5674
matt@turnerandturner.com

/s/ Matthew L. Turner

* * *

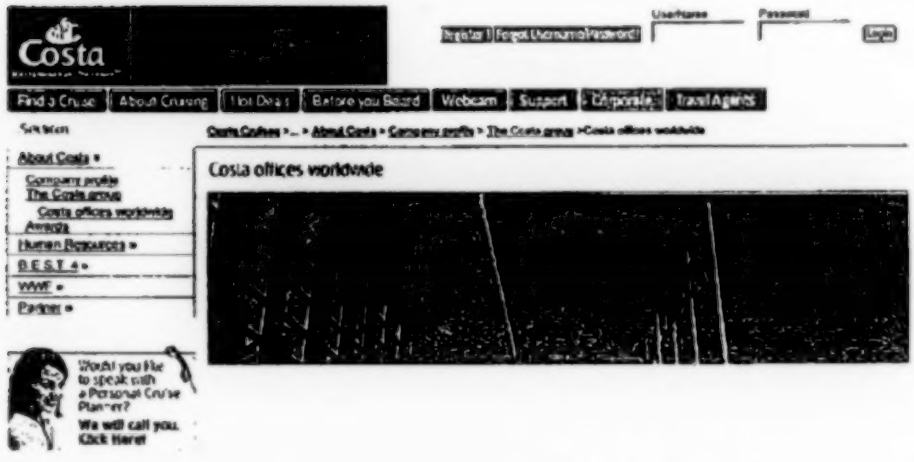
[Certificate of Service Omitted in Printing of this Appendix]

EXHIBIT 2

Costa Cruises, Costa Family Cruises,
Costa Cruise Line

http://www.costacruise.com/B2C/USA/
Corporate/The+company/theco...

(visited 6/6/2008 10:16 AM)



Costa Crociere is an international company with offices in 28 cities in 16 different countries.

Costa Crociere offices in Italy

Headquarters:
Genoa
Via XII Ottobre 2 - 16121 Genoa
Via De Marini 60 - 16149 Genoa

Sales offices:
Bologna
Via della Salute 14/2 - 40132 Bologna

Bari
Corso Vittorio Veneto, 13/15 - 70123 Bari
Milan
Via Turati 25 - 20121 Milan
Naples
Stazione Marittima, molo Angioino, lato Beverello - 80133 Naples
Padua
Via San Crispino 82 - 35129 Padua
Palermo
Via E. Amari 8 - 90139 Palermo
Rome
Via Aventina 20 - 00153 Rome
Turin
Corso Trento 5 - 10129 Turin

Costa Crociere offices worldwide

United Kingdom
Costa Cruises UK
5 Gainsford Street
London SE1 2NE - United Kingdom
http://www.costacruises.co.uk/

Belgium
Costa Cruises
Rue des Colonies, 18-24
B-1000 Brussels - Belgium
http://www.costacroisieres.bc/
http://www.costacruises.be/

Germany

Neu-Isenburg
Costa Kreuzfahrten

Niederlassung der Costa Corciere S.p.A.
Frankfurter Strasse 233 / Haus C
D-63263 Neu-Isenburg - Germany
Rostock
Call4Cruise GmbH
Am Strande 3a
D-18055 Rostock - Germany
http://www.costakreuzfahrten.de/

Austria
Costa Kreuzfahrten Osterreich
Kraussstrasse 10/2
A-4020 Linz - Austria
http://www.costakreuzfahrten.at/

France
Costa Croisières
2 Rue Joseph Monier Batiment C
92859 Rueil Malmaison Cedex - France
http://www.costacroisieres.fr/

Switzerland
Costa Kreuzfahrten
Stampfenbachstrasse 61
CH-8035 Zurigo - Switzerland
http://www.costakreuzfahrten.ch/

Spain

Barcelona
Costa Cruceros S.L.
c/Valencia 245 2° y 3°
08007 Barcellona - Spain
Madrid
Costa Cruceros S.L.
Plaza de Carios Trias Bertran, 7

Oficina 1 Nivel 02
28020 Madrid - Spain
http://www.costacruceros.es/

Portugal
Costa Crociere S.p.A - Escritório de
Representação em Portugal
Avenida da Liberdade, 110
1269-046 - Lisboa - Portugal
http://www.costacruzeiros.com.pt/

U.S.A.
Costa Cruise Lines N.V.
Venture Corporate Center II
200 South Park Road, Suite 200
Hollywood FL 33021-8541 - U.S.A.
http://www.costacruises.com/

Mexico
Costa Cruise Lines, N.V.
Paseo de la Reforma 373-102
Col. Cuauhtémoc
06500 Mexico, D.F.
http://www.costacruises.com/

Brazil

Rio de Janeiro
Costa Cruzeiros, Ag. Mar. e Tur. Ltda.
Rua da Assembléia 19/6° andar
20011-001 Centro Rio de Janeiro - Brazil
San Paolo
Costa Cruzeiros, Ag. Mar. e Tur. Ltda.
Edificio Pedro Biaggi
Avenida Paulista, 460 - 10° andar

01310-904 Bela Vista - San Paolo - Brazil
http://www.costacruzeiros.com.br/

Argentina
Costa Cruceros S.A.
Av. Corrientes 327, 10° piso
Buenos Aires 1043 - Argentina
http://www.costacruceros.com/

Hong Kong
Pacific Asia Operations
Room 2601-03, 26F Floor
Shui On Centre,
6-8 Harbour Road,
Wanchai, Hong Kong
http://www.costacruisesasia.com/B2C/HK/Default.htm

Shanghai - China
Pacific Asia Operations
Unit 2210 Shui On Plaza
Huaihai Middle Road 333
Shanghai
http://www.costacruisesasia.com/B2C/RC/Default.htm

Costa training schools

Costa Crociere has eight schools dedicated to the training of its personnel:

- 6 for the onboard hotel personnel, one in India (Hyderabad), two in the Philippines (Manila), one in the Dominican Republic (La Romana) and two in Indonesia (Bali and Jakarta);

- one for deck & engine personnel in the Philippines (Manila);

- Costa also has a modern Training Centre by the headquarters in Genoa (Casa del Campo) for technical and managerial training of all its shoreside and shipside penonnel.

For more information see your travel agent
or call **1-877-88-COSTA**

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Partita IVA IT 02545900108 - All rights reserved

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EXHIBIT 3

www.sunbiz.org - Department of State

http://www.sunbiz.org/scripts/cornamelis.exe

(visited 6/6/2008 11:11 AM)

Entity Name List

Corporate Name	Document Number	Status
COSTA CRUISE LINES N.V. L.L.C.	M99000001536	ACT
COSTA CRUISE LINES N.V.	P31625	INACT
COSTA CRUISES, INC.	822991	INACT
COSTA CUBA, INC.	G16165	ACT
COSTA-CUBA ENTERPRISES, INC.	G01580	INACT
COSTA DAY CARE CENTER, INC.	P97000075222	INACT
COSTA DEL CIELO LLC	L06000076039	ACT

COSTA DELIVERY INC.	P05000051053	INACT
COSTA DEL MAR, CORP.	F61522	INACT
COSTA DEL MAR, INC.	P98000041867	INACT
COSTA DEL MAR, LLC	L05000112409	ACT
COSTA DEL MAR CONDOMINIUM ASSOCIATION, INC.	N01000009051	ACT
COSTA DEL MAR CONTRACTORS, INC.	P95000020267	INACT
COSTA DEL MAR DEVELOPMENT CORPORATION	580998	INACT
COSTA DEL MAR IN A STYLIZED WRITING WITH A LINE UNDER THE WORDS ENDING IN A CIRCLE AROUND THE FIGURE OF A SAILBOAT WITH THE WORD SUNGLASSES UNDERNEATH THE CIRCLE	930863	INACT
COSTA DEL MAR PROPERTIES, LLC	L04000038558	INACT
COSTA DEL MAR REALTY, INC.	P04000061552	ACT
COSTA DEL MAR SUNGLASSES, INC.	G93406	ACT

COSTA DEL MAR SUNGLASSES INTERNATIONAL, INC.	J35200	INACT
COSTA DEL MAR VILLAS, LLC	L05000005788	INACT/UA
COSTA DEL ORE PRODUCTIONS, INC.	P98000036958	INACT
COSTA DEL PARAISO, L.L.C.	L07000052078	ACT
COSTA DEL PLAYA INC.	P05000106710	ACT
COSTA DEL REY ASSOCIATION, INC.	726200	ACT

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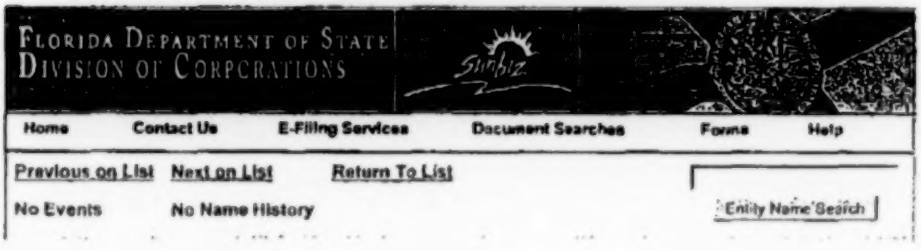
www.sunbiz.org - Department of State

http://www.sunbiz.org/scripts/cordet.exe?
action=DETFIL&inq_doc_...

(visited 6/6/2008 10:02 AM)



Detail by Entity Name

Foreign Limited Liability Company

COSTA CRUISE LINES N.V. L.L.C.

Filing Information

Document Number	M99000001536
FEI Number	650221239
Date Filed	09/29/1999
State	OC
Status	ACTIVE

Principal Address

200 SOUTH PARK ROAD, STE. 200
HOLLYWOOD FL 33021-8541

Changed 10/01/2001

Mailing Address

200 SOUTH PARK ROAD, STE. 200
HOLLYWOOD FL 33021-8541

Changed 10/01/2001

Registered Agent Name & Address

C T CORPORATION SYSTEM
1200 SOUTH PINE ISLAND ROAD
PLANTATION FL 33324 US

Name Changed: 01/14/2000

Address Changed: 01/14/2000

Manager/Member Detail

Name & Address

Title MGR

FOSCHI, PIER LUIGI
VIA XII OTTOBRE, 2
16121 GENOA, ITALY IT IT

Title MGR

ONORATO, GIOVANNI
VIA XII OTTOBRE, 2
16121 GENOA, ITALY IT IT

Title MGR

TORRENT, LYNN
200 SOUTH PARK ROAD, STE. 200
HOLLYWOOD FL 33021-8541 US

Title MGR

CURACAO CORPORATION COMPANY N.V.
DE RUITERKADE 62, P.O. BOX 812
CURACAO NETHERLANDS ANTILLES

Title MGR

MALTESE. BENIAMINO
VIA XII OTTOBRE, 2
16121 GENOA, ITALY IT IT

Annual Reports

Report Year	Filed Date
2006	01/13/2006
2007	02/02/2007
2008	01/24/2008

Document Images

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Note: This is not official record. See documents if question or conflict.

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EXHIBIT 5

Turner & Turner, P.C.

26000 W. Twelve Mile Road
Southfield, Michigan 48034
(248) 355-1727 Fax (248) 355-5674

LEE I. TURNER*

MATTHEW L. TURNER
KEVIN T. GRANADER
DEVLIN K. SCARBER
ARGYRIOS E. TSAKALAKIS

*MEMBER OF MICHIGAN & OHIO BARS

DONALD A. TURNER
RETIRED

July 2, 2007

Certified Mail, Return Receipt
7006-2150-0003-3861-7650
& Via Regular Mail
Costa Cruiselines, N.V.
200 South Park Road, Suite 200
Hollywood, FL 33021-8541

Re: Wanda Krupski
Ship: Costa Majica
Departure Date: 02-18-07
Booking No: 3250312
Cabin 2340

TO WHOM IT MAY CONCERN:

Please allow this letter to serve as notice of Ms. Krupski's claim for physical and emotional injury, which occurred aboard the Costa Majica on or around February 21, 2007. Ms. Krupski was attending a performance at the Theatre Deck 3. She tripped and fell over a camera cable that was left in a dangerous condition in the walkway where the passengers were required to walk to enter and exit the Theatre. The cable was close to the chair and she was unable to see the cable because of the light in the Theatre and the number of people who were all exiting at the same time.

As a result of the fall, she suffered a fracture of her right femur which required surgery, inpatient rehabilitation, homebound rehabilitation. and has left her with both physical and emotional injuries. Mrs. Krupski is seeking full compensation for these injuries.

Very truly yours,

TURNER & TURNER, PC
/s/
Matthew L. Turner

/vkr
cc: Berkley Care Claims Dept.
300 Jericho Quadrangle
PO Box 9022
Jericho, NY 11753
Claim No. 07CST00098

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 08-60152-CIV-ALTONAGA/Brown

[Filed July 3, 2008]

WANDA KRUPSKI,	)
	)
Plaintiff,	)
	)
vs.	)
	)
COSTA CRUISE LINES, N.V., L.L.C. d/b/a COSTA CRUISE LINES,	)
	)
Defendant.	)
	)

ORDER

THIS CAUSE came before the Court for a hearing on July 2, 2008 upon Defendant, Costa Cruise Lines, N.V., LLC's ("Costa N.V.['s]") Motion for Summary Judgment [D.E. 19]; and Plaintiff, Wanda Krupski's ("Krupski['s]") Motion for Leave to Amend Complaint to Add Costa Crociere, S.p.A. as a Defendant [D.E. 26]. For the reasons stated in open court, it is

ORDERED AND ADJUDGED as follows:

1. Costa N.V.'s Motion for Summary Judgment **[D.E. 19]** is **DENIED** without prejudice. Krupski shall provide notice to the Court by **August 15, 2008** whether it is dismissing Costa N.V. from this action.

In the event it does not do so, Costa N.V. may refile its Motion.

2. Krupski's Motion for Leave to Amend Complaint to Add Costa Crociere, S.p.A. as a Defendant **[D.E. 26]** is **GRANTED.** Krupski is directed to file an Amended Complaint with the Court listing Costa Crociere, S.p.A. ("Costa Crociere") as a defendant. The Court has been informed that Costa Crociere is an Italian corporation. Italy is a signatory of the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters. Based upon the Court's review of the applicable procedures set forth on the United States Department of State's website (see http://travel.state.gov/law/info/judicial/judicial_653.html#service), Krupski is ordered to effect proper service on Costa Crociere by **September 16, 2008.** Unless Plaintiff presents good cause, failure to effectuate service by this deadline will result in the entry of an order of dismissal without prejudice and without further notice.

DONE AND ORDERED in Chambers at Miami, Florida this 2nd day of July, 2008.

/s/
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 08-60152-CIV-ALTONAGA/Turnoff

[Filed July 11, 2008]

WANDA KRUPSKI, a single person,	)
	)
Plaintiff,	)
	)
vs.	)
	)
COSTA CRUISE LINES, NV, LLC, d/b/a COSTA CRUISE LINES, a foreign corporation (Netherland Antilles), and COSTA CROCIERE, S.p.A., a foreign corporation (Italy)	)
	)
Defendants.	)

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PLAINTIFF'S FIRST AMENDED COMPLAINT AND JURY DEMAND

NOW COMES the Plaintiff, WANDA KRUPSKI, by and through her undersigned attorney, and sues the Defendants, COSTA CRUISE LINES, N.V., L.L.C., d/b/a COSTA CRUISE LINES, and COSTA CROCIERE, S.p.A., and alleges as follows:

1. That this is a cause of action for damages in excess of Seventy-Five Thousand ($75,000.00) Dollars exclusive of costs, interest and attorney fees, the sum specified by 28 U.S.C. §1332.

2. At all times material hereto, the Plaintiff, WANDA KRUPSKI (hereinafter referred to as "Plaintiff") resided in the City of Detroit, County of Wayne, State of Michigan.

3. At all times material hereto, the Defendant, COSTA CRUISE LINES, N.V., L.L.C., d/b/a COSTA CRUISE LINES is registered to do business in Florida with an address of 200 South Park Road, Suite 200, Hollywood, Florida, 33021 but is a foreign corporation.

4. Defendant COSTA CRUISE LINES, N.V., L.L.C. is a Netherland Antilles Limited Liability Company.

5. At all times material hereto, the Defendant, COSTA CROCIERE, S.p.A. (Società per Azioni), is an Italian corporation.

Subject Matter Jurisdiction

6. This Court has subject matter jurisdiction for this claim pursuant to 28 U.S.C. §1332 in Diversity as the parties are completely diverse, and 28 U.S.A §1333(1) Saving to Suitors and in the alternative, 28 U.S.C. §1333, and rule 9(h) of the Federal Rules of Civil Procedure and under the General Maritime Law of the United States.

7. Plaintiff, WANDA KRUPSKI, was a paying passenger on the vessel *COSTA MAGICA*.

Venue, Personal Jurisdiction, and General Allegations

8. That on or about February 21, 2007, the Defendant COSTA CRUISE LINES, N.V., L.L.C. was a foreign corporation registered to do business in the State of Florida and maintained a permanent office for the transaction of business in Broward County, Florida.

9. Venue is proper in Broward County, as the Defendants' passenger ticket contains a forum selection, which requires any action to be brought exclusively in the United States District Court for the Southern District of Florida located in Broward County, Florida.

10. Plaintiff has complied with all pre-suit requirements of the passenger ticket contract by providing COSTA CRUISE LINES with a written detailed description of the circumstances of the incident that is the subject of this lawsuit in a letter dated July 2, 2007, mailed to COSTA CRUISE LINES at COSTA CRUISE LINES' principal place of business.

11. On or about February 21, 2007, the Defendant, COSTA CRUISE LINES owned, operated, managed, supervised and controlled the ocean-going passenger vessel known as the *COSTA MAGICA*.

12. On or about February 21, 2007, the Plaintiff was a fare-paying passenger aboard the *COSTA MAGICA* during a planned week-long Caribbean cruise that departed from and returned to Port Everglades, Florida.

13. While attending a performance at the Theatre Deck 3 on February 21, 2007, Plaintiff tripped and fell over a camera cable that was left in a dangerous condition in the walkway where the passengers were required to walk to enter and exit the Theatre. Due to the fact that the cable was close to the chair and she was unable to see the cable because of the light in the Theatre, Plaintiff tripped and fell and suffered a fracture of her right femur which required surgery,

extensive inpatient and homebound rehabilitation, and has left her with physical and emotional injuries.

14. On or about February 21, 2007 and for a considerable period of time prior thereto, the Defendant COSTA CRUISE LINES, by and through the acts of it's duly authorized agents, servants and employees and in the conduct and operation of its business, did hold out and extend to it's invitees an implied and expressed invitation to enter upon the property of COSTA CRUISE LINES, and specifically the vessel, COSTA MAGICA.

15. At all times relevant to this case, the defendants expressly and/or impliedly invited the plaintiff onto and about the ship, and thereby assumed the duty to use due care and caution to keep and maintain the ship, common areas and aisle ways in a safe condition to avoid causing injury to the plaintiff.

16. Defendants owed the plaintiff, WANDA KRUPSKI, who was rightfully in and about the ship, the duty to exercise reasonable care and caution in repair and maintenance of the ship, and to avoid creating any hazardous, dangerous conditions of which the defendants knew, or through the exercise of reasonable care should have known, so as not to cause injury or damage to plaintiff and others rightfully occupying the ship.

17. It was the duty of the defendants to exercise due care for the rights and safety of persons invited on the ship, and particularly, it was the duty of the defendants not to cause the public areas to be left in a dangerous and unsafe condition.

COUNT I

NEGLIGENCE OF COSTA CRUISE LINES, N.V.

Plaintiff incorporates paragraphs 1 through 17 as if fully set forth and alleges the following:

18. COSTA CRUISE LINES owed a duty to its passengers, including WANDA KRUPSKI, to exercise reasonable care under the circumstances, and specifically to equip and operate its vessel, the *COSTA MAGICA*, in a reasonable and safe manner, including any and all public areas on the vessel, specifically the aisleway in Theatre Deck 3 which is the subject of this Complaint.

19. COSTA CRUISE LINES breached its duty of care to WANDA KRUPSKI and was negligent and careless in at least the following ways:

a. Failing to provide safe ingress and egress in Theatre Deck 3;

b. Failing to provide warning to passengers of hidden perils in Theatre Deck 3;

c. Failing to properly set-up the cameras and other necessary equipment in the theatre so that passengers would not trip;

d. Failing to warn passengers that there were cables and other impediments in the aisle where they would be exiting the theatre;

e. Failing to properly maintain and keep the subject aisle in a reasonably safe condition for it passengers;

f. Failing to properly place and secure the necessary cords and cables in the theatre so that they would not present a trip hazard;

g. Failing to follow the cruise lines' own policies and procedures regarding setting up the theatre;

h. Creating the dangerous condition that existed in the aisle of theatre number 3;

i. Failing to use due care in setting up the equipment in the theatre;

j. Failing to remedy a hazardous condition of which it knew or should have known;

k. Failing to have proper lightening in the theatre at the time that patrons exited;

l. Failing to have polices and procedures in place which would provide for a safe method by which patrons could exit the theatre;

m. Failing to develop, maintain and utilize reasonable and proper safety policies, procedures and protocols to detect dangerous conditions of the subject aisle;

m. Failing to properly train and instruct the employees to set up the theatre, inspect for dangerous or hazardous conditions, and/or

remedy any dangerous or hazardous conditions that may exist

20. As a direct and proximate cause of the above described carelessness and negligence of COSTA CRUISE LINES, the Plaintiff, WANDA KRUPSKI, was injured, suffered a fracture of her right femur, endured pain and suffering, suffered a physical impairment and/or disability, mental anguish, loss of capacity for the enjoyment of life, the aggravation of pre-existing conditions, inconvenience, permanent disability, mental anguish and incurred necessary medical expenses for the treatment of her injuries. These injuries are permanent and continuing in nature. Plaintiff will suffer these losses and impairments in the future.

WHEREFORE, the Plaintiff, WANDA KRUPSKI, demands judgment for damages against the Defendant, COSTA CRUISE LINES, in excess of the minimal jurisdictional limits of this Court, as well as pre-judgment and post-judgment interest, costs and attorney fees incurred in bringing this action, along with any allowable punitive damages.

COUNT II

NEGLIGENCE OF COSTA CROCIERE, S.p.A.

Plaintiff incorporates and re-alleges paragraphs 1 through 20 as if fully set forth herein and alleges the following:

21. COSTA CROCIERE, S.p.A., as CARRIER under the terms of the passenger ticket contract, owed a duty to its passengers, including WANDA KRUPSKI, to

exercise reasonable care under the circumstances, and specifically to equip and operate its vessel, the *COSTA MAGICA*, in a reasonable and safe manner, including any and all public areas on the vessel, specifically the aisleway in Theatre Deck 3 which is the subject of this Complaint.

22. COSTA CROCIERE, S.p.A. breached its duty of care to WANDA KRUPSKI and was negligent and careless in at least the following ways:

a. Failing to provide safe ingress and egress in Theatre Deck 3;

b. Failing to provide warning to passengers of hidden perils in Theatre Deck 3;

c. Failing to properly set-up the cameras and other necessary equipment in the theatre so that passengers would not trip;

d. Failing to warn passengers that there were cables and other impediments in the aisle where they would be exiting the theatre;

n. Failing to properly maintain and keep the subject aisle in a reasonably safe condition for it passengers;

o. Failing to properly place and secure the necessary cords and cables in the theatre so that they would not present a trip hazard;

p. Failing to follow the cruise lines' own policies and procedures regarding setting up the theatre;

q. Creating the dangerous condition that existed in the aisle of theatre number 3;

r. Failing to use due care in setting up the equipment in the theatre;

s. Failing to remedy a hazardous condition of which it knew or should have known;

t. Failing to have proper lightening in the theatre at the time that patrons exited;

u. Failing to have polices and procedures in place which would provide for a safe method by which patrons could exit the theatre;

m. Failing to develop, maintain and utilize reasonable and proper safety policies, procedures and protocols to detect dangerous conditions of the subject aisle;

v. Failing to properly train and instruct the employees to set up the theatre, inspect for dangerous or hazardous conditions, and/or remedy any dangerous or hazardous conditions that may exist

23. As a direct and proximate cause of the above described carelessness and negligence of COSTA CROCIERE, S.p.A., the Plaintiff, WANDA KRUPSKI, was injured, suffered a fracture of her right femur, endured pain and suffering, suffered a physical impairment and/or disability, mental anguish, loss of capacity for the enjoyment of life, the aggravation of pre-existing conditions, inconvenience, permanent disability, mental anguish and incurred necessary

medical expenses for the treatment of her injuries. These injuries are permanent and continuing in nature. Plaintiff will suffer these losses and impairments in the future.

WHEREFORE, the Plaintiff, WANDA KRUPSKI, demands judgment for damages against the Defendant COSTA CROCIERE, S.p.A., in excess of the minimal jurisdictional limits of this Court, as well as pre-judgment and post-judgment interest, costs and attorney fees incurred in bringing this action, along with any allowable punitive damages.

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/s/ Matthew L. Turner

JURY DEMAND

Plaintiff demands a trial by jury.

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/s/ Matthew L. Turner

Dated: July 11, 2008

* * *

[Certificate of Service Omitted in Printing of this Appendix]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 08-60152-CIV-ALTONAGA/Brown

[Filed August 21, 2008]

WANDA KRUPSKI,	)
	)
Plaintiff,	)
	)
vs.	)
	)
COSTA CRUISE LINES, N.V., L.L.C.	)
d/b/a **COSTA CRUISE LINES**, and	)
COSTA CROCIERE S.p.A.,	)
	)
Defendants.	)
	)

ORDER OF DISMISSAL WITH PREJUDICE

THIS CAUSE came before the Court on Defendant, Costa Cruise Lines, N.V., L.L.C.'s ("Costa Cruise Lines['s]") Motion to Dismiss [D.E. 35], filed on July 28, 2008. Being fully advised, it is hereby

ORDERED AND ADJUDGED as follows:

1. Costa Cruise Lines' Motion to Dismiss **[D.E. 35]** is **GRANTED**.

2. Pursuant to the parties' Joint Stipulation for Dismissal with Prejudice [D.E. 41] filed on August 20, 2008, Costa Cruise Lines, N.V., L.L.C. is

dismissed with prejudice. Each party shall bear its own fees and costs.

3. The claims against the other Defendant, Costa Crociere S.p.A., remain.

DONE AND ORDERED in Chambers at Miami, Florida this 20th day of August, 2008.

/s/
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Ft. Lauderdale Division

CASE NO.:
08-60152-CIV-ALTONAGA/TURNOFF

[Filed September 3, 2008]

WANDA KRUPSKI, a single person,	)
	)
Plaintiff,	)
	)
vs.	)
	)
COSTA CROCIERE, S.p.A,	)
	)
Defendant.	)
	)

DEFENDANT'S MOTION TO DISMISS

COMES NOW, the defendant denominated by the plaintiff as COSTA CROCIERE, S.p.A, by and through their undersigned counsel, and pursuant to Rules 12(b)(6), 15 and 56 of the Federal Rules of Civil Procedure and Local Rules 7.1 and 7.5, respectfully urge the court to render an order dismissing the Plaintiff's First Amended Complaint and Jury Demand and as grounds state as follows:

Plaintiff fails to state a claim upon which relief can be granted against defendant Costa Crociere, S.p.A. Plaintiff named this entity as a defendant for the first time on July 11, 2008. This is untimely pursuant to the suit limitation provisions expressed in the Passage

Contract (GCPTC) and therefore plaintiff's complaint against this entity should be dismissed. On July 11, 2008 the applicable one year statute of limitations set forth in Section 2 of the General Conditions of Passenger Ticket Contract (GCPTC) had expired pursuant to 46 U.S.C. App. §183-b. Application of Fed. R.Civ. P 15(c) precludes relation back of the First Amended Complaint to the date of filing of the original action on February 1, 2008.

INTRODUCTION AND FACTUAL SUMMARY

This is a maritime personal injury action. According to the allegations contained in Plaintiff's First Amended Complaint and Jury Demand, Wanda Krupski, a passenger aboard the cruise vessel COSTA MAGICA, sustained personal injury on February 21, 2007, in a fall within the ship's theater (deck three). On February 1, 2008, the original action was filed in the United States District Court for the Southern District of Florida. Thereafter, the original Summons and Complaint were served on February 4, 2008, upon C.T. Corporation System, the registered agent for Costa Cruise Lines N.V., L.L.C. (CCL N.V.) the only named defendant in the original action. On February 25, 2008, defendant CCL N.V. filed its Answer and asserted the affirmative defense that CCL N.V. did not occupy the status of a "CARRIER" upon which substantive liability to the plaintiff for the claims alleged could properly be premised upon pursuant to the General Maritime Law of the United States. Motion practice and the court's order of July 2, 2008, resulted in plaintiff filing Plaintiff's First Amended Complaint and Jury Demand on July 11, 2008. On August 21, 2008, proper service was made upon

defendant Costa Crociere, S.p.A., in Genoa, Italy, pursuant to the Hague Convention.

ISSUE

The Passage Contract (GCPTC) in existence between plaintiff/passenger Wanda Krupski and the carrier Costa Crociere S.p.A. contained a one year statute of limitations pursuant to 46 U.S.C. App. §183-b. Utilizing the February 21, 2007 date of injury it is undisputed plaintiff's original action against Costa Cruise Lines N.V. LLC (CCL N.V.) was filed on February 1, 2008, and within the one year period. At issue is whether plaintiff's First Amended Complaint and Jury Demand, filed on July 11, 2007, "relates back" to the original filing date through application of Fed. R. Civ. P. 15(c). As will be set forth fully below, the First Amended Complaint does not "relate back" and should be dismissed with prejudice.

STATEMENT OF UNDISPUTED MATERIAL PACTS

1. International Risk Services, Inc., is an independent contractor of CCL N.V., and provides claim administration services to facilitate the handling of claims asserted by passengers on certain vessels owned and operated by Costa Crociere, S.p.A. (Exhibit 1: Klutz Affidavit paragraph 2 and 3).

2. International Risk Services, Inc., is not authorized to accept service of process on behalf of CCL N.V. or Costa Crociere, S.p.A. (Klutz Affidavit paragraph 3).

3. CCL N.V. is organized under the laws of the Netherlands Antilles and has its principal office at Venture Corporate Center II, 200 S. Park Road, Suite 200, Hollywood, Florida 33021-8541 (Klutz Affidavit paragraph 5).

4. CCL N.V. is not authorized to accept service of process on behalf of Costa Crociere, S.p.A. (Klutz Affidavit paragraph 7).

5. Costa Crociere, S.p.A. is an Italian company with its headquarters in Genoa, Italy, with offices located at Via XII, Ottobre 2-16121, Genoa, Italy (Klutz Affidavit paragraph 8).

6. This action was originally commenced by the filing of a Summons and Complaint on February 1, 2008. The action identified Costa Cruise Lines, N.V., L.L.C., d/b/a Costa Cruise Lines as the only defendant. (CCL N.V.) The registered agent for CCL, N.V., CT Corporation System, 1200 S. Pine Island Road, Plantation, Florida 33324, was served on February 4, 2008. CCL N.V. filed its Answer and Affirmative Defenses on February 25, 2008.

7. Plaintiff's First Amended Complaint, which identified for the first time Costa Crociere S.p.A. a foreign corporation as a defendant, was filed with the clerk of the court on July 11, 2008, pursuant to an order of July 2, 2008. Within that same order the court instructed plaintiff to effect proper service on defendant Costa Crociere, S.p.A. by September 16, 2008. Proper service of process was made on August 21, 2008.

MEMORANDUM OF LAW

The Plaintiff's First Amended Complaint must be considered under Fed. R. Civ. P. 15 (c) (which took effect on December 1, 1991) and the Rule's predecessor *Schiavone v. Fortune,* 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed 2d 18 (1986). The amendment of Rule 15(c) was expressly intended to change the result reached in *Schiavone.* The predecessor Rule 15 (c) conditioned application of the relation back doctrine upon notice to the party (to be brought in by the amended pleading) within the statute of limitations provided by law for commencement of the action. The 1999 amendment to Rule 15(c) places a different period of time (defined by Rule 4(m) i.e., 120 days) as the time period by which the intended defendant had to receive notice of the initial action.

Presently, an amended complaint will relate back to the date of the filing of the original complaint if all of the following criteria under Rule 15(c)(3) are satisfied: (1) the claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original complaint; (2) within 120 days after the filing of the original complaint, the newly named defendant "has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits;" and (3) within 120 days after the filing of the original complaint, the newly named defendant "knew or should have known that, but for a mistake concerning the identity of the appropriate party, the action would have been brought against the party." Fed.R.Civ.P. 15(c)(3); see also *McCulley v. Allstates Technical Servs.*, 2005 WL 1475314, * 16 (S.D. Ala. June 21, 2005)

First Criteria (Similarity of Conduct Transaction or Occurrence)

Regarding the first criteria under Rule 15 (c), Costa Crociere, S.p.A. has reviewed the allegations contained in the initial complaint and the First Amended Complaint. Costa Crociere S.p.A. does not dispute the claims alleged in the First Amended Complaint arise from the same conduct, transaction, or occurrence set forth in the original complaint.

Second Criteria (Notice within 120 days)

The second criteria under Rule 15 (c) requires that the intended new defendant receive "notice" of the action within the 120 day time period calendared from the date of the filing of the original action, here February 1, 2008. Plaintiff's First Amended Complaint does not allege CCL N.V. and Costa Crociere, S.p.A., are so closely related and intertwined such that they occupy an identity of interest. Moreover, the undisputed material facts set forth in the Klutz affidavit demonstrate the two entities are entirely distinct from one another and do not operate out of the same office. The undisputed material facts set forth in the Klutz affidavit establish neither CCL N.V. nor International Risk Services, Inc., are registered agents or authorized to accept service of process on behalf of Costa Crociere S.p.A.

In assessing the second criteria under Rule 15 (c) a corporation receives "notice" within the meaning of Rule 15(c)(3) when its registered agent for service of process receives the complaint even if the complaint does not identify the corporation as a party. *In re U.S. Plastic Lumber Corp.* 2008 WL 1848790 *4 (Bkrtcy.

S.D. Fla. 2008); citing *Peterson v. Sealed Air Corp.*, 902 F.2d 1232, 1237 (7th Cir. 1990). The undisputed material facts establish neither CCL N.V. nor International Risk Services Inc. are registered agents for Costa Crociere, S.p.A., or are otherwise authorized to accept service of process on its behalf. Analogous to both *U.S. Plastic Lumber* and *Peterson* is *In re Allbrand Appliance and Television, Co. 875 F.2d 1021 (2d Cir. 1989).* In recognizing the corporate structure must be respected, *Allbrand* held that for purposes of Rule 15(c) notice to a subsidiary did not constitute notice to the parent corporation. Accordingly, plaintiff does not satisfy the second criteria required by Rule 15(c).

Third Criteria (What Constitutes a "Mistake" Within the Meaning of Rule 15(c))

The third and final criteria for relation back under Rule 15(c) is that within 120 days of the original complaint, the party to be added knew or should have known that but for a mistake concerning the identity of the proper party, the original action would have been brought against it. This third criteria requires an analysis of what constitutes a "mistake" within the meaning of Rule 15(c). *Powers v. Graff,* 148 F.3d 1223, 1226 (11th Cir. 1998). For purposes of interpreting Rule 15(c), there is no "mistake" where the plaintiff knew before the statute of limitations period expired that it could name a party as a defendant but did not. *Keller v. United States,* 667 F.Supp 1351, 1357-58 (S.D. Cal. 1987); citing *Kilkenny v. Arco Marine, Inc.,* 800 F.2d 853 (9th Cir. 1986). Because plaintiff is charged with knowledge that Costa Crociere, S.p.A. was identified as the "Carrier" within the GCPTC and was a proper defendant, plaintiff was obligated to name Costa

Crociere S.p.A. in a timely fashion. Rule 15(c) was never intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion to notice of a potential party, nor was it intended to permit a plaintiff to engage in piecemeal litigation. *Kilkenny* at 857-858.

The fundamental principle for the interpretation and enforcement of contractual terms and limitations printed on cruise ship ticket is that the Carrier "did all that it reasonably could to warn the passengers of its limited liability." *Barbachym v. Costa Line, Inc.*, 713 F.2d 216, 219 (6th Cir. 1983). The "reasonably communicative test" does not impose on the ship's owner the duty to design the "best" ticket or an "ideal" warning. The test requires only that the ship's owner employ "reasonable" means to communicate the importance of the ticket provision to the passenger. *Nash v. Kloster Cruise A/S, 901 F.2d 1565 (11th Cir. 1990); Euland v. M/V Dolphin IV*, 685 F.Supp 942, 946 (D.S.C. 1988); *Marek v. Marpan Two, Inc., 817 F.2d 242 (3d Cir. 1987); Silvestri v. Italia Societa Per Azioni Di Navigazione, 388 F.2d 11 (2d Cir. 1968); Ames v. Celebrity Cruises, Inc., 1998 WL 427694 (S.D.N.Y.)*

The "reasonably communicative test" has on countless occasions been utilized to find valid and enforceable forum selection clauses which are deemed "reasonably communicated" to the passenger through the passage contract. *See: Valenti v. Norwegian Cruise Lines*, 2005 WL 927167 (S.D.N.Y. 2005). It is the passage contract which forms the legal relationship between the passenger and the carrier. The identical test is used in assessing the enforceability of the one year statute of limitations which may be imposed by

passenger cruise ship contracts (46 U.S.C. App. §183). *See: Berg v. Royal Caribbean Cruises, Ltd.*, 1994 AMC 806 (D.N.J. 1982), *Marek v. Marpan Two, Inc.*, 837 F.2d 242 (3rd Cir. 1987).

On the instant facts, the clear and unambiguous disclosure of Costa Crociere, S.p.A. as the "carrier" should similarly be addressed by this Court under the "reasonably communicated test." Counsel is under an affirmative duty to ascertain the proper defendant particularly when it can be done through "minimal investigation." *Garcia v. Peter Carlton Enterprises, Ltd 717 F.Supp.1321, 1327 (N.D. Ill. 1989).* It is undisputed the instant GCPTC employs "reasonable" measures to communicate to the plaintiff the fact the "carrier" is Costa Crociere S.p.A.

Just as previous courts have enforced forum selection provisions and the statutorily permitted one year statute of limitations, this court should similarly find the GCPTC "reasonably communicates" to passengers (including plaintiff) who the "carrier" is. Thereafter, as a matter of law it is only the carrier who is the correct defendant. The undisputed material facts before the court conclusively establish the GCPTC satisfies the "reasonably communicated test." Therefore, plaintiff should be charged with having knowledge of who the proper defendant in this action is. It is undisputed this knowledge existed before the statute of limitations expired.

On these facts the liberal provisions of Rule 15 should not be applied where the intended new defendant, Costa Crociere S.p.A., was unambiguously identified within the GCPTC as the proper defendant for an action such as this. Through the GCPTC Costa

Crociere S.p.A. was identified to plaintiff through satisfaction of the "reasonably communicated" test. Using the long observed "reasonably communicative" test, the GCPTC satisfies, as a matter of law, the requirement of identifying the carrier to plaintiff. Having done so through the only document which creates the legal relationship between the passenger and the carrier, Costa Crociere S.p.A. is entitled to repose once the statute of limitations has expired. *Powers* 148 F.3d at 1227.

The plaintiff's failure to correctly identify the proper defendant before expiration of the statute of limitations cannot be conveniently characterized as a "misnomer" or "slip of the pen" in failing to identify the proper defendant. Here, the GCPTC names the correct defendant and takes the "guess work" out of the plaintiff's obligation to identify the correct defendant. *Rendall-Sperenza v. Nassim, 107 F.3d 913, 918 (D.C. Cir. 1997)*

The relation back provisions of Rule 15 are not applicable where the identity of the newly added defendant was known to the plaintiff before the running of the statute of limitations and where the potential defendants should not necessarily have known that, absent a mistake by the plaintiff, they would have been sued. *Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998). When relation back is too liberally allowed the important policy reasons for limitation periods are circumvented. *Wells v. HBO & Co.*, 813 F.Supp. 1561, 1567 (N.D. Ga. 1992)

In *Powers v. Graff, 148 F.3d 1223, 1226 (11th Cir. 1998)*, the court affirmed an order granting summary judgment in favor of the defendant based upon the

argument the amended complaint did not relate back pursuant to Rule 15(c). In reaching its decision, the court referred specifically to the underlying policy of the rule. "The Advisory Committee notes (1991) state that Rule 15(c) deals with 'the problem of a misnamed defendant.' . . . nothing in the rule or in the notes indicate that the provision applies to a plaintiff who was fully aware of the potential defendant's identity but not of its responsibility for the harm alleged."

The *Powers* decision and its reasoning is directly applicable to the instant fact. Here, it is undisputed the plaintiff knew of the defendants' identities. It is undisputed plaintiff received the travel documents including the General Conditions of Passage Ticket Contract (GCPTC) on January 4, 2007, when CCL, N.V. mailed these materials from Milan, Italy, to plaintiffs travel agent. It is settled law that travel agents are considered agents of the ticket purchaser and the purchaser is charged with constructive notice of the terms and conditions of the ticket while the ticket is in the agent's possession. *Murie v. Norwegian Cruise Lines, Ltd.*, 305 F.Supp 2d 352, 360; citing *Ames v. Celebrity Cruises, Inc.*, 1998 WL 427694 *5 N.10 (S.D.N.Y.)

The "reasonably communicative test" should be applied here in the context of Rule 15 (c). Plaintiff's undisputed possession of the GCPTC in this instance conveys upon plaintiff her actual knowledge of the identity of Costa Crociere, S.p.A. "Even the most liberal interpretation of 'mistake' cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset." *Wells* 813 F.Supp at 1567. As a matter of law plaintiff had actual knowledge of the existence of Costa Crociere, S.p.A.

and Costa Crociere, S.p.A.'s status as the "carrier." Because plaintiff is charged with notice of the terms and conditions contained in the GCPTC, as a matter of law plaintiff possessed this knowledge before and upon the expiration of the applicable statute of limitations which is imposed by the GCPTC and is enforceable under 46 U.S.C. App. §183.

The requirements set forth within Rule 15(c) were similarly addressed by the court in *In re U.S. Plastic Lumber Corp. v. Altsentzer,* 2008 W.L. 188790 *4 (Bkrtcy. S.D. Fla.) *supra.* In finding the plaintiff's amended complaint did not satisfy the third requirement for relation back under Rule 15 (c) the court noted prior to expiration of the statute of limitations the plaintiff did have knowledge of the identity of the intended defendant and its "potential role in any wrongdoing, but chose not to seek recovery from the company or name it as a defendant." Id. at *5 The court found the relation back doctrine did not apply because plaintiff knew of the defendant's existence and alleged role in the "wrongdoing" but failed to name them in the original pleading. *Id.* As a matter of law plaintiff knew of and is charged with knowledge of Costa Crociere S.p.A. through the GCPTC. With this knowledge existing before expiration of the statute of limitations plaintiff can not satisfy the "mistake" criteria contained in Rule 15 (c).

The instant case is distinguishable from *Hill v. U.S. Postal Service,* 961 F.2d 153 (11th Circ. 1992) a case involving a "misnamed defendant" as contemplated by the Advisory Committee Notes. The court ultimately permitted a *pro se* plaintiff's amended complaint to relate back when he mistakenly named the "Postal Service" instead of the "Postmaster

General" as the defendant in the initial action. The court noted Rule 15(c)(3) was satisfied because the "Postmaster General" was actually served with the summons and first amended complaint less than 120 day after the filing of the original complaint. Such is not the case where Costa Crociere S.p.A. has not been served within the 120 days period.

Rule 15(c) mandates the intended defendant receive notice of the original action within 120 days of the filing of the original complaint. Here, the original action was commenced by filing of the summons and complaint on February 1, 2008. Accordingly, the 120 day period commenced on February 2, 2008, and expired on June 2, 2008. On February 25, 2008, defendant CCL, N.V. timely filed its Answer and Affirmative Defenses. CCL, N.V.'s affirmative defense (contained in paragraph 11) fully disclosed and communicated to plaintiff: 1) Costa Crociere, S.p.A., was the Carrier, and 2) CCL N.V. was a sales and marketing agent for the carrier/vessel operator, Costa Crociere, S.p.A. CCL N.V.'s affirmative defense concluded " ... under the circumstances the defendant Costa Cruise Lines, N.V. does not occupy a status upon which substantive liability to the plaintiff for the claims alleged can properly be premised pursuant to the General Maritime Law of the United States" (Exhibit 2)

It is significant that on February 25, 2008, the legal status and more importantly the legal distinction between Costa Crociere, S.p.A. and CCL N.V. was explicitly communicated to plaintiff within the affirmative defenses filed by CCL, N.V. Subsequent to February 25, 2008, it was incumbent upon plaintiff to preserve her eventual reliance upon Rule 15(c) the

"relation back" doctrine by taking the necessary measures to place Costa Crociere, S.p.A. on "notice of the institution of the action" within the 120 day period specified by Rule 4(m). After CCL, N.V. filed its Answer and Affirmative Defenses plaintiff had nearly 100 days to affirmatively act, effect service of process, and provide Costa Crociere, S.p.A. with the notice required by Rule 15(c). The identical issue arose in *Suppa v. Costa Crociere, S.p.A. 2007 WL 4287508 (S.D.Fla.)* where the original action was served on CCL N.V. not Costa Crociere, S.p.A., the carrier. In *Suppa* the plaintiff acted promptly upon being made aware of the distinction between CCL N.V. and Costa Crociere, S.p.A. Once the distinction was realized, plaintiff promptly obtained leave of court to file an amended complaint, and thereafter promptly made service upon Costa Crociere, S.p.A. in Italy within 120 days. Plaintiff here has not. Plaintiff does not satisfy the third criteria required by Rule 15(c).

WHEREFORE, Defendant Costa Crociere, S.p.A. respectfully requests, pursuant to Rules 12(b) (6), 15 (c) and 56 of the Federal Rules of Civil Procedure, that this motion be granted and Plaintiffs First Amended Complaint and Jury Demand be dismissed with prejudice.

Respectfully submitted,

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* * *

[Certificate of Service and Service List Omitted in Printing of this Appendix]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 08-60152-CIV-ALTONAGA/Turnoff

[Filed September 15, 2008]

WANDA KRUPSKI, a single person, Plaintiff,	)
vs.	)
COSTA CRUISE LINES, NC, LLC, d/b/a COSTA CRUISE LINES, a foreign corporation (Netherland Antilles), Defendant.	)

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PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

NOW COMES, Plaintiff, by and through her attorneys, Turner & Turner, P.C., and in response to Defendant's Motion to Dismiss, respectfully urge the court to render an order DENYING the Defendant's Motion to Dismiss and as grounds states as follows:

Plaintiff has properly stated a claim upon which relief can be granted against defendant Costa Crociere, S.p.A. As this honorable court is undoubtedly familiar with the facts giving rise to this case, Plaintiff will merely highlight the facts and circumstances relevant to the present motion.

On **February 21, 2007**, Plaintiff sustained personal injury while aboard the cruise vessel COSTA MAGICA. On **July 2, 2007**, less than five (5) months after the incident giving rise to this case, Plaintiff's counsel notified CCL N.V. of Plaintiff's claims (**Exhibit 1**). On **July 9, 2007**, Plaintiff received a response from the Defendant's Claims Administrator (**Exhibit 2**). Nowhere in Defendant's response did the

Claims Administrator indicate that COSTA CRUISES LINES, N.V. L.L.C. was an improper party to the anticipated litigation or that Costa Croceiere, S.p.A. was the proper party.

On **February 1, 2008**, Plaintiff properly filed its original action in the United States District Court for the Southern District of Florida. On **February 4, 2008**, the Summons and Complaint were served on the registered agent for Costa Cruise Lines N.V., L.L.C. On **February 25, 2008**, CCL N.V., L.L.C. filed its Answer.

Subsequently, CCL N.V. brought forth a motion for summary judgment on the basis that CCL N.V. was not the proper defendant. Upon learning that Costa Crociere, S.p.A. may be the proper defendant, Plaintiff brought a motion to amend her Complaint to add Costa Crociere, S.p.A. Per the Court's Order, Plaintiff's Amended Complaint adding Costa Crociere, S.p.A. was filed on **July 11, 2008**. Proper service was made upon Defendant Costa Crociere, S.p.A. on **August 21, 2008**. Defendant Costa Crociere, S.p.A. now brings the present Motion to Dimiss claiming that Plaintiff's First Amended Complaint does not relate back to the filing of Plaintiff's original complaint, and therefore, is untimely. As demonstrated below, pursuant to Fed. R. Civ. P. 15(c) and relevant legal precedent, Plaintiff's amended Complaint does relate back to Plaintiff's original Complaint and, therefore, Defendant's Motion to Dismiss should be denied.

MEMORANDUM OF LAW

Fed. R. Civ. P. 15(c) states in pertinent part:

An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the **amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence** set out--or attempted to be set out--in the original pleading; or

(C) **the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:**

(i) received such notice of the action that it will **not be prejudiced** in defending on the merits; and

(ii) **knew or should have known that the action would have been brought against it**, but for a mistake concerning the proper party's identity.

"Courts impute notice of the existence of a lawsuit when there is sufficient "**identity of interests**" between the original and new parties. Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998). Identity of interests "generally means that **the parties are so closely related in their business operations or other activities that the institution of an action**

against one serves to provide notice of the litigation to the other." Id.

Constructive or imputed notice can exist, for instance, **when the original and added parties are a parent corporation and its wholly owned subsidiary** or are co-executors of an estate. Rogatz v. Hosp. Gen. San Carlos, Inc., 89 F.R.D. 298 (D. Puerto Rico 1980). Often "**notice may be imputed to the new party through shared counsel.**" Jacobsen, 133 F.3d at 320." Pompey v. Lumpkin, 321 F. Supp. 2d 1254, 1263 (M.D. Ala. 2004).

It is undisputed that all of the claims in Plaintiff's amended complaint arise out of the same transaction and occurrence set out in her original complaint, i.e. the incident causing her to suffer injuries aboard the COSTA MAGICA. It is undisputed that Plaintiff timely filed her Complaint against CCL N.V. It is undisputed that Plaintiff timely served CCL N.V. and that CCL N.V. had proper notice of this lawsuit.

Further, there exists an **identity of interests** between Costa Crociere, S.p.A. and CCL N.V. Plaintiff's passage contract and travel documents were mailed to Plaintiff's travel agent by CCL N.V. (Defendant's Motion for Summary Judgment, pg. 5). CCL N.V. is an agent of Costa Crociere, S.p.A. (Defendant's Motion for Summary Judgment, pg. 6). The inside cover of the travel document packet lists C.C.L. N.V.'s name and address. Costa Crociere's website lists CCL N.V. as a Costa Crociere worldwide office. The managers of CCL N.V. maintain there offices at the same address listed for Costa Crociere, S.p.A. It appears that both CCL N.V. and Costa

Crociere, S.p.A are subsidiaries of the same corporation.

First Criterion (Similarity of Conduct Transaction or Occurrence)

It is undisputed that the claims alleged in Plaintiff's First Amended Complaint arise from the same conduct, transaction, or occurrence as set forth in the original complaint. Therefore, the first "relation back" criterion is satisfied.

Second Criterion (Notice within 120 Days)

The primary issue before the court is whether Costa Crociere, S.p.A. received such notice of the action that it will **not be prejudiced** in defending on the merits; and **knew or should have known that the action would have been brought against it**, but for a mistake concerning the proper party's identity, within 120 day of the original Complaint. **Rule 15(c) does not require actual notice to be given to the party to be brought in by amendment.** Dutka v. Southern R. Co., 92 F.R.D. 375, 378 (N.D. Ga. 1981). "Courts impute notice of the existence of a lawsuit when there is sufficient "**identity of interests**" between the original and new parties. Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998). Identity of interests "generally means that **the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other.**" Id. Often "**notice may be imputed to the new party through shared counsel.**" Jacobsen, 133 F.3d at

320." Pompey v. Lumpkin, 321 F. Supp. 2d 1254, 1263 (M.D. Ala. 2004).

In Korn v Royal Caribbean Cruise Line, 724 F.2d 1397 (1984) (**Exhibit 3**), the Court found a sufficient community of interests between the cruise line's general sales agent, the owner of the ship, the operating agent of the ship, and the insurance company. The Court imputed the notice given to the marketing agent on the owner of the ship. The Court stated:

All correspondence between the parties concerned reflects that they were fully aware of the date of the accident and the identity of the person injured. Most of this correspondence identifies the cruise ship and even the number of the cruise. It also reveals that Mr. Korn was informed, through correspondence to his attorney, that the matter was being looked into; that a settlement might be in the offing; and that the "principals" had been notified of his pending claim.

Correspondence addressed to RCCL Inc. was forwarded by a "claims clerk" for Port Cruise Services, Inc., the self-identified operating agent for both RCCL A/S and the M/S "Song of Norway," to Caribbean Marine Associates, Inc. (CMA), for its response to Mr. Korn's claim. CMA requested additional information, including medical reports and bills and the completion of its "Claimant's statement" by Mr. Korn, so that it could inquire into the circumstances surrounding the matter. All correspondence between CMA and Mr. Korn's attorney noted that copies had been sent to Port Cruise Services, Inc., the operating agent for RCCL A/S.

Following a letter concerning possible settlement in lieu of filing suit which requested an immediate reply, Mr. Korn's attorney was advised that the matter had been forwarded to CMA's principals for review. Later inquiries were mailed; when no response was forthcoming suit was filed on July 31, 1981. Even after suit was filed, Mr. Korn's attorney attempted to verify that the proper party defendant had been named by telephoning CMA. Although Mr. Greenop (the individual with whom Mr. Korn's attorney had been communicating) was absent from the office, his associate advised that RCCL Inc. was the correct party to name as a defendant in personal injury litigation.

RCCL A/S should not be allowed to utilize Fed. R. Civ. P. 15(c) as a log to hide behind. CMA, RCCL A/S' agent for claims purposes, knew full well of the pending suit and had been notified that the complaint was filed before expiration of the limitation period.

Id. at 1400-1401 (emphasis added).

Likewise in the present case, correspondence between Plaintiff's counsel and the Defendant's claims handler, provides sufficient evidence that Defendant Costa Crociere, S.p.A. was put on notice of Plaintiff's claims as early as July 9, 2007 (Exhibit 2). Furthermore, the Defendant's claims handler, Laurence A. Klutz, Costa Crociere, S.p.A. should not be allowed to utilize Fed. R. Civ. P. 15(c) as a log to hide behind. CCL N.V., Costa Crociere's agent for claims purposes, knew full well of Plaintiff's action and had been notified that the complaint was filed before the expiration of the limitation period. Therefore, Defendant's Motion to Dismiss should be denied.

Furthermore, as admitted by the Defendant, the identical issue arose in Suppa v. Costa Crociere, Sp.A., 2007 WL 4287508 (S.D. Fla.). Plaintiff hereby asserts and incorporates by reference, the arguments made in Plaintiff's Response to Defendant's Motion to Dismiss from Suppa (**Exhibit 4**) and in Plaintiff's Surreply to Defendant's Reply to Defendant's Motion to Dismiss from Suppa (**Exhibit 5**). In fact, despite the Suppa Court's rejection of its arguments, the same defendant from that case is attempting to employ the same strategy in the present case (**Exhibit 6**). Despite the Defendant's attempts to distinguish it, Suppa is also directly on point. Costa Crociere, S.p.A. as Defendant in this case employs the same attorneys to represent them as the original Defendant CCL N.V. As previously stated, Costa Crociere's claims handler had proper notice of the suit. It is simply inconceivable that Defendant Costa Crociere was not on notice of the facts that 1) an action had been instituted, and 2) but for the mistake in the original Complaint, Costa Crociere was the appropriate party to be named in the action.

The original defendant CCL N.V. and Defendant Costa Crociere share the same attorneys. Defendant Costa Crociere's claims handler had notice of Plaintiff's claims well-before this case was initially filed. The nature of these companies is intimately intertwined. Clearly, there is an identity of interests between Costa Crociere, S.p.A. and CCL N.V. As such, the notice provided to CCL N.V. should be imputed to Costa Crociere, S.p.A. Costa Crociere, S.p.A. was put on constructive notice of this lawsuit within 120 days of Plaintiff's filing of her original complaint. Therefore, Plaintiff's motion to add Costa Crociere, S.p.A. should be granted.

Third Criterion (Defendant knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity)

Despite the Defendant's baseless attempts to shift the relevant inquiry to the Plaintiff's knowledge, Rule 15(c) unambiguously specifies that the proper inquiry is in regard to what the Defendant knew of should have known regarding the action. Plaintiff's counsel attempted to identify the proper party to this case (**Exhibit 7**). As stated above, through its claims handler, Defendant Costa Crociere, S.p.A. had noticed of Plaintiff's claims well-before the original Complaint was filed. The Defendant should not be permitted to use Fed. R. Civ. P. 15(c) as a log to hid behind.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter an Order DENYING Defendant's Motion to Dismiss, and award costs and fees to Plaintiff for having to respond to this baseless motion.

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* * *

[Certificate of Service Omitted in Printing of this Appendix]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

CASE NO.:
08-60152-CIV-ALTONAGA/TURNOFF

[Filed September 24, 2008]

WANDA KRUPSKI, a single person,	)
	)
Plaintiff,	)
	)
vs.	)
	)
COSTA CROCIERE, S.p.A,	)
	)
Defendant.	)
	)

DEPENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

COMES NOW, the defendant denominated by the plaintiff as COSTA CROCIERE, S.p.A, by and through its undersigned counsel, and pursuant to Rules 12(b)(6), 15 and 56 of the Federal Rules of Civil Procedure and Local Rules 7.1 and 7.5, hereby files this, its Reply Memorandum of Law in Support of Defendant's Motion to Dismiss and in support thereof states as follows:

Plaintiff fails to state a claim upon which relief can be granted against defendant Costa Crociere, S.p.A. Plaintiff named this entity as a defendant for the first

time on July 11, 2008. This is untimely pursuant to the valid suit limitation provisions expressed in the Passage Contract (GCPTC). Therefore plaintiff's complaint against this defendant should be dismissed. On July 11, 2008 the applicable one year statute of limitations set forth in Sections 1 and 2 of the General Conditions of Passenger Ticket Contract (GCPTC) had expired pursuant to 46 U.S.C. §30508(b)(2) (formerly 46 U.S.C. §183-b) Application of Fed. R.Civ. P 15(c) precludes relation back of the First Amended Complaint to the date of filing of the original action on February 1, 2008. COSTA CROCIERE, S.p.A. respectfully moves the Court for the entry of an Order granting its Motion to Dismiss.

MEMORANDUM OF LAW

Plaintiff Fails to Meet All of the Requirements of Rule 15(c)

Plaintiff's Response to Defendant's Motion to Dismiss does not overcome all of the requirements of the plain language of Federal Rule of Civil Procedure 15. This Court in *Suppa v. Costa Crociere, S.p.A.*, 2007 WL 4287508 (S.D.Fla. 2007) (slip copy) states explicitly that

There are four prerequisites to a 'relation back' amendment under rule 15(c):

(1) the basic claim arose out of the conduct, transaction, or occurrence set forth in the original pleading;
(2) the party to be brought in has received such notice that it will not be prejudiced in maintaining its defense;

(3) that party knew or should have known that, but for a mistake concerning identity, the action would have been brought against it; and

(4) the second and third requirements **must have been fulfilled** within the proscribed period for service of process-120 days after the filing of the original complaint.

Suppa v. Costa Crociere, S.p.A., 2007 WL 4287508 at *1 (quoting *Hill v. U.S. Postal Serv.*, 961 F.2d 153 (11th Cir. 1992); Fed.R.Civ.P. 15(c)) (emphasis added).

It is undisputed service upon the proper party was accomplished past the 120 day deadline set forth in Federal Rule of Civil Procedure 4(m). Plaintiff bases her entire argument on the premise that some aspects of the test set forth in Rule 15(c) were met, but fails to establish why Plaintiff does not have to meet the entire test as enumerated by this Court in *Suppa*.

Suppa is distinguishable from the case sub judice. In *Suppa*, this Court determined the plaintiff's claim did "relate back" to the original claim because plaintiff did refile within the 120 days necessary under Rule 15. In the case *sub judice* this did not occur. On these facts *Suppa* is not authority supporting that plaintiff's claim should relate back here.

Plaintiff strains to argue a sufficient connection between Costa Crociere, S.p.A. and Costa Cruise Lines, N.V., L.L.C. (hereinafter "CCL") for purposes of Rule 15(c). Plaintiff's argument confuses what is a very clear concept: plaintiff did not have to engage in any more "due diligence" than reading the passage ticket

contract to determine who the proper defendant for service would be. Plaintiff named the incorrect party, then did not comply fully with Rule 15 as set forth in 11th Circuit case law, and is now asking this court to fix the error. This is not the type of "mistake" pondered by Rule 15 and is similar to *Nobles v. Rural Community Ins. Services,* 303 F.Supp2d. 1279 (M.D.Ala. 2004):

> Nobles and Hale's proposed amended complaint cannot relate back under Rule 15(c)(3) because their failure to name East and Wells Fargo as defendants was not a result of a "mistake." * * * [Plaintiff] long knew of East's involvement in the transaction at issue, and should have known that [defendant] was a subsidiary of Wells Fargo. Thus, their "mistake" was a mistake in legal judgment, not a mistake in the naming of the party, and thus is not covered by Rule 15(c).

Nobles v. Rural Community Ins. Services, 303 F.Supp.2d at 1286.

As in *Nobles,* plaintiff knew from the passage contract (GCPTC) Costa Crociere S.p.A. was the carrier and the proper party. At the very least plaintiff knew Costa Crociere S.p.A. may have had a "potential role" and should have been named in the initial complaint. *See: In re U.S. Plastic Lumber Corp. v. Altsentzer,* 2008 W.L. 188790 *5 (Bkrtcy. S.D. Fla.) This information was unquestionably available to plaintiff. This court cannot correct this "mistake in legal judgment" by using Rule 15(c), as plaintiff suggests.

Plaintiff is also not entitled to any "good cause" extension of service upon Costa Crociere, S.p.A.. In Plaintiff's cited case *Pompey v. Lumpkin,* 321 F.Supp.2d 1254 (M.D.Ala. 2004), the Court explains:

> However, assuming that the "good cause" exception in Rule 4(m) does apply to relation-back analysis under Rule 15(c)(3), Lumpkin is correct that Pompey has not shown good cause for an extension [and is not entitled to an extension]. * * *
>
> Pompey has not demonstrated good cause for his failure to give Lumpkin notice within 120 days after he filed his complaint. The original defendants' failure to inform Pompey that he had named the wrong defendant does not constitute good cause. The name of the warden at the time Pompey was incarcerated was not information available only to the defendants. Rather, it was public information; Pompey or his attorney could have discovered it without assistance from the original defendants. [Nor did plaintiff suffer from any incumbrance upon him finding out the warden's name].

Pompey v. Lumpkin, 321 F.Supp.2d at 1260.

As in *Pompey,* plaintiff does not satisfy the "mistake" requirement. Plaintiff had no hindrance in identifying Costa Crociere S.p.A, because its identity was communicated as a matter of law in plaintiff's passage ticket contract.

All the "imputed notice" cases cited by plaintiff are distinguishable to the case *sub judice,* because relation

back applies only if there is a finding of both "imputed notice" and "mistake." This duel requirement is set forth in *Rogatz v. Hospital General San Carlos, Inc.*, 89 F.R.D. 298 (D.P.R. 1980). Factually, CCL is a distinct corporation formed under the laws of the Netherlands Antilles while Costa Crociere, S.p.A. is an Italian corporation. They do not maintain the same offices or directors. *Rogatz* is on all fours with the proposition that relation back should be denied, for failure to satisfy the "notice" requirement, when the companies are separate and distinct:

> But this principle [of imputed notice] cannot be applied indiscriminately. The similarity or identity of interest theory is mainly and principally applied where the original and added parties are a parent corporation and its wholly owned subsidiary, or related corporations whose officers, directors, or shareholders are substantially identical and who have similar names or share office space, past and present forms of the same enterprise, or co-executors of an estate.
> ***
> Permitting the amendment [to add another defendant] would result in clear prejudice to the added party by depriving it of the statute of limitations defense which, in the absence of proper notice under Rule 15(c)(1) is a complete bar to the action against it.

Rogatz v. Hospital General Sun Carlos, 89 F.R.D. at 300 (citations omitted).

More importantly, and damaging to plaintiff's argument is the same court in *Rogatz* determined that

a plaintiff's lack of due diligence to obtain the identity of the proper party weighs against the plaintiff:

> The record in the present case clearly indicates that there was no mistake as to the identity of the proper party, but quite to the contrary, had plaintiffs exercised due diligence they could have readily obtained information as to the identity of the additional party within the limitation period.

Rogatz v. Hospital General Sun Carlos, 89 F.R.D. at 301

Thus, relation back applies only if there is a finding of both "imputed notice" and "mistake." Plaintiff in her brief does not even argue the second requirement of "mistake" has been met. As in *Rogatz,* this Court should weigh against plaintiff the fact that with minimal due diligence (reading the passage ticket contract would suffice) the identity of Costa Crociere S.p.A. would have been determined within the statute of limitations and the 120 days set forth by Rule 15.

The Ninth Circuit case of *Korn v. Royal Caribbean Cruise Line, Inc.,* 724 F.2d 1397 (9th Cir. 1984) is also not analogous to the case *sub judice.* Plaintiff argues *Korn* stands for the proposition that service upon cruise line ticketing agents should automatically impute knowledge to the carrier. There are distinctions between *Korn* and the case *sub judice* that prevent the "automatic imputation" of notice which the plaintiff desires. First, the *Korn* opinion does not address the required element of the plaintiff's "mistake." On this point alone *Korn* is distinguishable. Factually, Korn turns on the court's exhaustive

explanation of its facts and found the ticketing agent was essentially acting as a passthrough to the cruise carrier and that all correspondence to the sales agent was forwarded to a "claims clerk" that worked directly for the proper party. Furthermore, it was made known that the sales agent informed the "principals" that a settlement was in the works. The court interpreted this language as meaning that because the sales agent passed the information on to the people who worked for the proper party it was reasonable to impute notice to the cruise carrier. A vigorous and well reasoned dissent concludes the record did not establish "imputed notice" existed between "independent, though business related, corporations." *Id.* At 1402 In the present case there is nothing in the record that information received by Larry Klutz was passed to Costa Crociere, S.p.A., This court should further resist plaintiff's inference that Mr. Klutz is affirmatively obligated to advise plaintiff who the correct defendant should be for purposes of any forthcoming lawsuit. That information was already communicated clearly in the passage contract, as a matter of law. But even assuming *arguendo* there is imputed knowledge on these facts, application of Rule 15(c) additionally requires the plaintiff to satisfy the "mistake" element of the rule. Plaintiff has not.

Plaintiff cites *Dutka* v. *Southern Ry. Co.*, 92 F.R.D. 375 (N.D.Ga. 1981) for the proposition that constructive knowledge is sometimes permissible in a Rule 15 setting. While this is technically true, it cannot be said that Dutka supports Plaintiff's argument on these facts. *Dutka* presented a situation where the proper party was the parent company of the improperly served party and owned all of the corporate stock of the improperly served party. Evidence existed

that a common "claims division" existed for all of the companies owned by the parent corporation. This shared claims division effectively provided notice to the parent company. *Dutka v. Southern Ry. Co.*, 92 F.R.D. at 378. However, *Dutka* is factually distinguishable because the court specifically found the plaintiff satisfied the "mistake" requirement of the relation back test finding "but for the mistake involving the identity of the proper party, [they] would have been named as a defendant in this action. Thus, the court concludes that the third requirement of the three part test for the application of the relation back doctrine under Rule 15(c) has been met." *Id at* 378. Here, plaintiff has failed to satisfy the "mistake" requirement of Rule 15(c).

Finally, plaintiff cites a Fifth Circuit line of cases ending with *Jocobsen v. Police Officer Osborne*, 133 F.3d 315 (5th Cir. 1998) for the proposition notice can be imputed through shared counsel. *Jacobsen* is entirely distinguishable because although it found the "notice" requirement was satisfied, it also specifically found on its facts the plaintiff had also satisfied the "mistake" requirement of Rule 15(c). In explaining application of the relation back analysis the court stated " ... Therefore, the "notice" *and* "mistake" clauses in subpart (3) come into play. Both must be satisfied." *Id.* At 320. The court found "mistake" on the *Jacobsen* facts where the identity of the (defendant) arresting police officer was misidentified in both the arrest records and in the defendant's (City of New Orleans) answers to interrogatories. Once the "misidentification" was discovered plaintiff sought leave to amend to name the actual arresting police officer by name. The court noted the "misidentification" of the actual arresting police officer

"is exactly the situation at which Rule 15(c) is aimed: the misidentification of a defendant as also discussed *infra." Id* at 320. The final aspect of the court's analysis is its comparison to Barrow *v. Wethersfield Police Dept.* 66 F.3d 466, (2d Cir. 1995), *modified by* 74 F.3d 1366 (2d Cir. 1996) which also emphasized both the "notice" and "mistake" requirements of the rule. *Jacobsen at 320. Barrow* rejected plaintiff's relation back argument because it found plaintiff knew who the intended defendants were, thus, there was no "mistake" for purposes of satisfying the rule.

Interpretation of Rule 15(c) by every court which has addressed this issue requires timely satisfaction of both the "notice" and "mistake" elements. Notice does not substitute for mistake. Plaintiff's brief argues only notice, which alone, does not satisfy the mistake requirement of Rule 15(c). As a matter of law plaintiff had actual knowledge of the existence of Costa Crociere, S.p.A. and Costa Crociere, S.p.A.'s status as the "carrier." Because plaintiff is charged with notice of the terms and conditions contained in the GCPTC, as a matter of law plaintiff possessed this knowledge before and upon the expiration of the applicable statute of limitations which is imposed by Sections 1 and 2 of the GCPTC and is enforceable under 46 U.S.C. §30508(b)(2) (formerly 46 U.S.C. App. §183b). This knowledge when viewed in light of the legal authority defining what is a "mistake" for purposes of Rule 15(c) requires a finding that plaintiff has not carried her burden of establishing all of the required elements of the rule.

WHEREFORE, Defendant Costa Crociere, S.p.A. respectfully requests, pursuant to Rules 12(b)(6), 15(c) and 56 of the Federal Rules of Civil Procedure, that

this motion be granted and Plaintiff's First Amended Complaint and Jury Demand be dismissed with prejudice.

Respectfully submitted,

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* * *

[Certificate of Service and Service List Omitted in Printing of this Appendix]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case 08-60152-CIV-Altonaga

MIAMI, FLORIDA
[Dated July 2, 2008]

WANDA KRUPSKI,	)
	)
Plaintiff,	)
	)
vs.	)
	)
COSTA CROCIERE S.p.A.,	)
	)
Defendant.	)
	)

TRANSCRIPT OF MOTION FOR
SUMMARY JUDGMENT
BEFORE THE HONORABLE
CECILIA M. ALTONAGA,
UNITED STATES DISTRICT JUDGE

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TOTAL ACCESS COURTROOM REALTIME
TRANSCRIPTION

July 2, 2008

[p.2]

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ADMINISTRATIVE CONVENTIONS:

When counsel does not identify themselves each time they address the Court during a telephone conference, the industry-standard speaker identification is indicated by chevrons, i.e., >>>:

[p.4] THE COURT: Please be seated. Good afternoon.

In Wanda Krupski versus Costa, could I have counsel state your names, please.

MR. BERLOWITZ: Good afternoon, Your Honor. Jeff Berlowitz, Phillips, Cantor & Berlowitz, local counsel, for the plaintiff.

MR. TURNER: This is Matthew Turner on the phone, also for the plaintiff.

MR. HORR: David Horr, Your Honor, from Horr, Novak & Skipp, for the defendant.

THE COURT: Good afternoon.

Mr. Horr, we're here on your motion, so why don't I hear from you first.

MR. HORR: Do you prefer I work from the podium?

THE COURT: The podium would be better. Thank you.

MR. TURNER: I'm having a difficult time hearing. I don't know if you can change the microphone or the phone location. It's difficult to hear.

MR. HORR: Matt, can you hear me now?

MR. TURNER: I can hear you, but it's pretty soft.

THE COURT: I suppose that's why we have local counsel present.

MR. HORR: Your Honor, as Your Honor is probably aware this is a passenger personal injury claim for a fall-down incident on the COSTA MAGICA, and the issue here is really [p.5] straight-forward in our view. The plaintiff has instituted suit against the wrong party. The plaintiff brought suit against Costa Cruise Lines N.V. LLC, which the record is very clear, it's a sales and marketing agent only. The controlling instrument here is a passage contract and it's referred to in the papers as the GCPPC. I'm not very good with that so I'm going to call it passage contract.

It's apparent, Your Honor, from paragraph 8 of the plaintiff's Complaint that the plaintiff and her counsel had the ticket before suit was filed because there's an allegation in there referencing the Forum Selection Provision and the necessity of compliance with that.

In addition, there has been no suggestion in the record the plaintiff didn't have the ticket. In fact, if you look at the plaintiff's recitation in the statement of material facts in their response, they admit the ticket. They admit the notice provision in the ticket. They admit the passenger's agreement to the terms, and they admit the definition of the carrier is Costa

Crociere S.p.A and they also admit there's an integration provision that says it's the entire agreement.

What, I guess, the plaintiff's argument -- well, the ticket also identifies CCL N.V., Costa Cruise Lines N.V., very clearly as the sales and marketing agent only and not the carrier, and in that capacity, Costa Cruise Lines N.V. doesn't occupy a status which the maritime law contemplates substantive [p.6] liability to the plaintiff for, you know, for a personal injury in this context.

The Kornberg case, Your Honor, cited in the paper, that's an 11th Circuit case. In addition, Your Honor, there's Valenti versus Home Lines, which is 614 Fed. Supp. 1, another case in the context that makes it very clear that CCL N.V. doesn't have any substantive liability.

Now, the plaintiff's counter-argument, I think, is really -- you can capture it twofold. First, the contention is it's too early to determine whether Costa Cruise Lines N.V. falls under the definition of carrier in the passage contract and, second, that CCL N.V. and Costa Crociere S.p.A are intimately intertwined entities.

Now, the problem, in our view, of the plaintiff's argument is they've run afoul of the Celotex requirement. The plaintiff hasn't introduced anything of a factual nature that even supports those contentions. Basically, they make a conclusory statement in the papers and there's nothing that has been cited by way of evidence or affidavit, deposition or

anything else, that's competent to respond to the motion for summary judgment.

Plaintiff's argument also, Your Honor, in our view, runs afoul of the law. Costa Cruise Lines N.V., LLC and Costa Crociere S.p.A are separate and distinct corporate entities.

THE COURT: Isn't the gist of the plaintiff's argument [p.7] under Rule 56(f) that, in essence, "Give me some time to do some discovery so that I can interpose an issue of material fact. At the start of this lawsuit, we don't have the information"? Isn't that essentially it?

MR. HORR: Well, I think, Your Honor, that may be what the plaintiff is contending, but I don't think under the rules that saves the plaintiff in the context of the motion, and here's why: First off, we have the Rule 11 obligation that the plaintiff is bound to do some investigation ahead of time before filing suit, and the other thing, Your Honor, the most salient distinction here that operates, in my view, is the fact that the plaintiff possessed the ticket which gives them all this information, and Costa Cruise Lines N.V., LLC, as the sales and marketing agent, which the ticket clearly identifies them as, they don't occupy a status that the general maritime law contemplates they can have substantive liability to the passenger.

So the plaintiff can discover to their heart's content and it's not going to change the preclusion that the general maritime law imposes that it's the carrier only that has the obligation to exercise reasonable care for the welfare of the passenger.

If you look at the Membreno case, Your Honor -- it's 425 F.3d 932, an 11th Circuit case -- slightly different context, but in that case the 11th Circuit recognized that [p.8] corporate distinctions shouldn't be disregarded absent fraud, improper conduct or illegality or bad faith. We don't have any contention of that here and there has been no showing.

If you look at the plaintiff's arguments about the ticket provisions, there's a provision invoking defenses, but that doesn't make CCL N.V. a carrier, and then the last is plaintiff's argument about the notion of when carrier is discussed and --

THE COURT: Affiliates, agents.

MR. HORR: The key phrase there is "on board."

Once again, we have the legal preclusion that the general maritime law supplies that sales and marketing agent can't, as a matter of law, have substantive liability to the plaintiff here. It's the carrier. It's Costa Crociere S.p.A which the record is undisputed was the ship owner and operator.

One last item I want to address, Your Honor, is the notion of relation back, and I think in this context the Futility Doctrine operates because I think our record is clear that the information was known to the plaintiff because they had possession of the passage contract. The Garcia case talks about the notion that counsel is under an affirmative duty to ascertain proper party defendants if it can be done through minimal investigation, which in this case it could have been with the passage contract could have been with the passage contract.

[p.9] The Powers case, Your Honor, 11th Circuit case cited in the paper, talks about where the plaintiff knows or should have known of the identity of the party sought to be subsequently joined, the Relation Back Doctrine doesn't apply, and then, lastly, Your Honor, Rendall-Sperenza is the case cited also in the paper talks there about the notion that a potential defendant who has not been named in a lawsuit, by the time the statute of limitations has run is entitled to repose unless it is or should be apparent that he is the benefit of a mere slip of the pen.

We don't have a mere slip of the pen here. We have --

THE COURT: If you take a look at Powers versus Graff, 11th Circuit 1998, it cites to Rendall-Sperenza.

MR. HORR: Aha.

THE COURT: The 11th Circuit says that Rule 15(c) permits an amendment to relate back only where there has been an error made concerning the identity of the proper party, one, and where that party is chargeable with knowledge of the mistake, but does not permit relation back where there is a lack of knowledge of the proper party.

By your own argument, you're saying the plaintiff knew the proper party all along because the proper party was named in the passenger ticket contract. So this is not an instance where there's a lack of knowledge of the proper party. So then we have to take a look and see whether the first two elements [p.10] are satisfied. One of the elements is is the party chargeable with knowledge of the mistake, i.e., in this

case, is the right Costa chargeable with knowledge? And that's an issue that you have not addressed. Nor has the plaintiff.

MR. HORR: Correct.

THE COURT: That would presumably be addressed with evidence. I suppose if I asked you the question, you might have to divulge some attorney-client information which you'd rather not. So we're left with that as a question mark.

The second question is was there an error made concerning the identity of the proper party? It certainly appears from the plaintiff's submission that plaintiff has committed an error and the plaintiff now says "Let me sue the two and let me ferret out who the right one is. I'll add the other," and not stated in precise words is "If I'm wrong, I'll leave the right one in and remove the wrong one."

When you look at, for example, Wright's Federal Practice & Procedure, the rule, again, is that Rule 15(c) provides that within the period prescribed for commencing an action against him, the party to be brought in by amendment, one, has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits and, two, knew or should have known that but for the mistake concerning the identity of the proper party, the action would have been brought against the party.

[p.11] Again, the record here is silent. If I had to surmise or speculate on what the answer to those two

queries would be, it would be that the proper party here knew both --

MR. HORR: I can't answer because I don't know.

THE COURT: -- knew first that it had received notice of the institution of the action against the wrong party and knew or should have known that but for the mistake, it would have been brought against the right Costa.

So, isn't it appropriate under the present circumstances to allow the plaintiff to explore these issues in discovery before I say that to allow the amendment would be a futility?

MR. HORR: Your Honor, I'll respond to that by saying no, I don't believe it is, and here's why: I'm looking at the same Powers v. Graff -- and I'm not too good at ferreting out the numbers, but I think I'm going to read if you a passage from page 1226. It's page 4 printed out of Westlaw in the left-hand column. It starts at the bottom.

The 11th Circuit there says "Although the relation back provisions of Rule 15 are to be somewhat liberally applied, the purpose of the provision does not support relation back in cases like this one, cases where the newly added defendants were known to the plaintiff before the running of the statute of limitations" --

THE COURT: And.

[p.12] MR. HORR: -- "and where the potential defendants should not necessarily have known that

absent a mistake by the plaintiff, they would have been sued."

THE COURT: The second clause doesn't apply here.

MR. HORR: Well, I disagree, Your Honor, because the plaintiff was possessed with the knowledge --

THE COURT: I'm not addressing the first element.

MR. HORR: I understand.

The Rule 15 provisions, in my view, from the standpoint of relation back, is to excuse the plaintiff where the information couldn't have been properly discerned or there was some mistake and I don't think we have that here.

If you read, Your Honor, to the next headnote, "The purpose of Rule 15(c) is to permit Amended Complaints to relate back to original filings for statute of limitation purposes when the Amended Complaint is correcting a mistake about the identity of the defendant in terms of slips of the pen or information not known."

If you look at the plaintiff's argument in opposition where they cite to all these websites and, Your Honor, with all due respect to my adversary, it's all extraneous information because they had the ticket and the ticket --

THE COURT: But the very sentence you read from on page 1226 requires two things to apply before the Relation Back Doctrine is no longer available to a party, and we cannot say [p.13] on the present record

that the second has been conclusively established even if I were to agree with you as to the first.

MR. HORR: Correct. But, Your Honor, from the standpoint of allocation of burden at this stage of the game under the Celotex rule, isn't it incumbent upon the plaintiff --

THE COURT: We're not dealing with summary judgment here, though. We're dealing with a request for leave to amend a pleading. If we were dealing with the Celotex rule, then we would be looking at the proof adduced and at this stage, clearly, there has been practically no discovery.

So I think it would amount to an abuse of discretion for me to say to the plaintiff here "You can't amend and you can't be given the opportunity to research these matters that apply to Rule 15 because I, as a matter of law, am going to say that Costa didn't know"? I can't.

MR. HORR: Your Honor, I respect what you're saying, obviously.

THE COURT: All right.

Let me then hear from Mr. Turner or Mr. Berlowitz. I am not sure who is addressing the matter.

MR. TURNER: Good afternoon, Judge. Mr. Turner.

You know, I listened to what the Court said to opposing counsel and I think the Court has hit the nail directly on the head.

[p.14] THE COURT: Mr. Turner, could I interrupt --

MR. TURNER: Even in the cases --

THE COURT: Mr. Turner, Mr. Turner, are you on a speaker-phone?

MR. TURNER: Yes.

THE COURT: You need to get off a speaker-phone.

MR. TURNER: Is that better?

THE COURT: Yes.

MR. TURNER: I think there's a couple of crucial points. Number one, as relates to the request that we be allowed to amend the Complaint, even the cases that the defendant cites are cases where the Court allows the plaintiff to amend and then afterwards, on a motion for summary judgment and discovery was done and all of the facts were known ultimately decided relation back wasn't appropriate.

You can look at both the García case, which they cite. You can look at the Randall-Sperenza case which they cite. Both of those cases the Trial Court allowed the plaintiff to amend the Complaint. The fact of the matter is that both those cases are completely distinguishable to this case as relates to the Relation Back Doctrine because in one of them -- I think it was the García case -- the original plaintiff who would have been the one providing notice to the correct -- the service on the original defendant would have been the acts providing notice on the subsequently named

defendant was not completed [p.15] until after the Statute of Limitations expired and the Court said, relying on the Schiavone case, a U.S. Supreme Court case, 477 U.S. 21, clearly said because this was after the Statute of Limitations expired, you can't impute notice. Clearly, that's not what we have in this case.

In the Rendall-Sperenza case, likewise, there was a situation where the plaintiff didn't, they didn't name one of the parties, but in that case it was clear the parties did name, did have a legal duty to the plaintiff, and it was very easy to say that it could have been just a judgment call by the plaintiff not to have named the other defendant, clearly different than the facts we have in this case.

So I think the bottom line is the Court has a right -- the Court has to allow me to amend. The Court has to allow me to conduct discovery. I think the Court also requires when we do conduct discovery to be clear that Costa Cruise Lines N.V. and, indeed, Costa Crociere did know about this case and it would relate back, and that really is appropriate for a summary judgment motion.

One other case that I wanted to bring to the Court's attention after the pleadings were filed in this matter is the case of Korn versus Royal Caribbean out of the 9th Circuit. It's 724 F.2d 1397, a 1984 case that's almost virtually identical to the facts in this case in that it's a cruise ship case. It's a case where the plaintiff sued the ticketing [p.16] agent. It's a case after they sued the ticketing agent, they learned that was not the carrier. They then tried to bring in the carrier. They had the ticket. Almost virtually identical facts and the 9th Circuit said "Under these facts it

does relate back and the plaintiff should be allowed to proceed with their case."

I think that's a very important case that the Court ought to keep in mind. As it relates to Costa Cruise Lines N.V., I think under the plain language of the ticket, Costa Cruise Lines N.V. clearly can't be a carrier. We may have two appropriate defendants in the case. Again, we won't know that without doing discovery. But while the defendant keeps saying they're the sales and marketing agent, they may well be a sales and marketing agent. They can also be a carrier under the express language of the contract if they were on board during the cruise. There was no one who submitted an affidavit saying they didn't have anybody on board. Until there's discovery, we don't know.

I think the Court has it and I think the appropriate relief here is to deny the motion as to summary judgment, allow the plaintiff to amend the Complaint, allow Costa Crociere to be added. Discovery can come after and the defendant can make the Rule 56 motion at the appropriate time.

THE COURT: I'm going to ask you, Mr. Turner -- I know you're done speaking for the moment --

[p.17] MR. TURNER: I'm sorry, Judge, I didn't hear you.

THE COURT: First of all, I can't have you appear by phone at any future hearings, and I think Mr. Berlowitz can explain why. It is very difficult to hear you. It's very difficult for my court reporter to take

down what you are saying. This is the first and last time I will allow you to appear by phone.

Secondly, as we continue today, please be mindful you're speaking very quickly and your voice is not projecting at all. It makes it doubly hard to take down what you say.

MR. TURNER: Okay.

THE COURT: Let me address the existing defendant and the motion for summary judgment. Is it your position that as soon as you find out that the ticketing agent had no employees on board the ship that you will voluntarily dismiss the presently named defendant?

MR. TURNER: As I understand the state of the law and the facts, that's correct.

THE COURT: All right.

So, assuming Mr. Horr were to provide you, as soon as he can, affirmative proof that there was no employee aboard, you would concede then that you will dismiss with prejudice that defendant?

MR. TURNER: If he can provide me with affirmative proof that there was no employees of Costa Cruise Lines N.V. on [p.18] board the ship, then I think I would have no choice under the law to dismiss them.

THE COURT: So I think it behooves defense counsel to get you that information and --

MR. HORR: I will, Your Honor.

THE COURT: -- and I understand then that, Mr. Turner, you will do the responsible thing upon receipt of that information and not incur needless exposure to yourself and your client by keeping an improper defendant in this action.

MR. TURNER: Oh, I certainly don't want to do that. I don't want to create needless expense for anybody or work for anybody.

You know, obviously, I don't know what Mr. Horr is going to provide me with. You know, I guess the only thing I would say to the Court, you know, during this motion hearing today is I think I have to have some leeway to say whether what he provides me is conclusive or whether I need to do discovery as to what he has said.

THE COURT: All right.

Is there anything additional, Mr. Horr, any additional argument you wish to present?

MR. HORR: Not at this juncture, Your Honor. I've taken my shot at persuading you. I have a pretty good inclination where you're headed, so I'm not going to waste your time.

[p.19] THE COURT: I will be denying the motion for summary judgment --

MR. HORR: Your Honor, I don't mean to interrupt.

THE COURT: Yes.

MR. HORR: Might it not be appropriate to defer on the motion for summary judgment because you're granting the plaintiff's -- I assume -- I'm anticipating you're going to grant the plaintiff's application to amend because the motion for summary judgment -- if we have some issue about what I furnish to Mr. Turner, it may be, you know, it may be appropriate for Your Honor to make the determination of the sufficiency of what I furnished him, as opposed to denying the motion, because I think what you're doing legally here in terms of the chronology or the sequence of it is you're kind of deferring the motion for summary judgment for the time being. You're going to permit him to amend his Complaint to name Costa Crociere and then we'll cross the bridge whether that should relate back or not to the date of initial filing as opposed to making a determination that there is some issue of fact about Costa Cruise Lines N.V.'s potential liability. I don't think that's what Your Honor is determining. I don't mean to put words in your mouth, but --

THE COURT: Here is how I see the issue on summary judgment. The lawsuit was filed in February. The motion was timely filed before discovery was taken.

[p.20] I'm interpreting the plaintiff's response to be a request under Rule 56(f) for time to be able to respond in opposition. I am fairly convinced that you are right and that the plaintiff has named the improper defendant. Before I enter judgment, I'm giving the plaintiff the opportunity to quickly engage in that discovery and either, one, enter a voluntary dismissal with prejudice, failing which, two, you will file your renewed motion for summary judgment and

say "The discovery has been and now enter judgment accordingly."

MR. HORR: I'm sorry to interrupt.

THE COURT: That's how I saw it.

MR. HORR: My only concern was a denial of the motion for summary judgment, I didn't want it operating as some sort of collateral estoppel.

THE COURT: It's not. It's not because it's being denied only because plaintiff needs time to engage in discovery. So it's sort of a denial without prejudice with the hope that the correct thing will occur. Either, one, the plaintiff will do as I'm indicating and enter his voluntary dismissal with prejudice, or, two, you will your motion and say "Now it's ripe," with the full record.

The plaintiff will be allowed to file the Amended Complaint naming the carrier and, of course, the parties will engage in discovery regarding the elements necessary for a Relation Back Doctrine to apply.

[p.21] I'll give the plaintiff 10 days to file the amended pleadings and the discovery cut-off is November 21st. I'm sure you will be engaging in very diligent discovery in the next several months.

MR. TURNER: Judge, can I just be heard for one second here?

THE COURT: Yes.

MR. TURNER: Costa Crociere is an Italian company. So once I name them, once I amend my Complaint and style that, I'm going to have to serve them through the Hague Convention, and so I have no idea how long it's going to take to effectuate service on them.

THE COURT: And so you know because of the present trial order it behooves you to do that expeditiously. Hire your translator. Hire the appropriate folks to do this for you on an expedited basis and pay the increased fees for expediting it.

MR. TURNER: I will certainly do that.

THE COURT: All right.

Gentlemen, thank you very much.

MR. TURNER: Will the Court be issuing a written order?

THE COURT: Yes.

MR. BERLOWITZ: Thank you, Judge.

THE COURT: Thank you. You all have a good day.

[p.22]

[Blank Page in Original]

[p.23]

CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

12/30/08
DATE

/s/ _____
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PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
FEB 24 2010
OFFICE OF THE CLERK

No. 09-337

In The
Supreme Court of the United States

WANDA KRUPSKI, a single person,
Petitioner,

v.

COSTA CROCIERE, S.p.A.,
a foreign corporation (Italy),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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February 24, 2010

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BOTH 5E05YH

243

QUESTION PRESENTED

Petitioner, Who Was Injured On The Costa Magica, An Ocean-Going Vessel, Filed Suit Seeking Recovery From The Vessel Operator For Breach Of The Legal Duties Imposed On A Vessel Operator. Suit Was Filed Against Costa Cruise, The Booking And Sales Agent, Rather Than Its Affiliate, Costa Crociere, The Actual Owner And Operator Of The Costa Magica. Fed. R. Civ. P. 15(c)(1)(C) Permits An Amended Complaint To "Relate Back", For Limitation Purposes, When The Amendment Corrects A "Mistake Concerning The Proper Party's Identity". Did The Court of Appeals For The Eleventh Circuit Err In Upholding The Denial Of "Relation Back" On The Ground That There Can Be No Such "Mistake" Where The Plaintiff Had "Imputed" Knowledge Of The Identity Of The Added Defendant Prior To Suit By Its Identification As "Carrier" In The Eleven Page Ticket?

PARTIES TO THE PROCEEDINGS

Petitioner Wanda Krupski is a Michigan resident who booked a cruise aboard the Costa Magica, which departed from Florida. While at sea, Ms. Krupski fractured her femur when she tripped over a camera cable. Petitioner filed the personal injury suit which gives rise to these proceedings.

Respondent Costa Crociere S.p.A. ("Costa Crociere"), the owner and operator of the Costa Magica, is an Italian corporation. It sold the cruise ticket to Petitioner through Costa Cruise Lines N.V. LLC ("Costa Cruise"), its affiliated booking agent based in Florida. Petitioner initially filed suit against Costa Cruise, which was dismissed by stipulation. That entity was not involved in the appeal and is not a party in this Court.

Petitioner filed an Amended Complaint against Costa Crociere. The dismissal of the suit against Costs Crociere is the subject of this Brief. As Defendant in the underlying personal injury suit and Appellee in the Court of Appeals, Costa Crociere is the Respondent in this Court.

Petitioner's Rule 29.6 Disclosure Statement is found at p. iii of her Petition for a Writ of Certiorari.

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OPINIONS AND ORDERS BELOW

Suit was filed in the United States District Court for the Southern District of Florida, Miami Division (# 08-60152-CIV). On October 21, 2008, Hon. Cecilia M. Altonaga, United States District Judge, issued her summary judgment Order (DE 50; 8a-22a),[1] holding that Petitioner's identification of Costa Cruise, but not Costa Crociere, in the initial Complaint did not constitute a "mistake concerning the proper party's identity" within the meaning of Fed. R. Civ. P. 15(c)(1)(C)(ii). Therefore, she ruled, the Amended Complaint did not "relate back" and the claim against Costa Crociere was time-barred by the one-year limitation period found in the ticket. The District Court Order is unpublished.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit (#08-16569-JJ). By Opinion of June 22, 2009 (1a - 7a), the Court of Appeals affirmed (Hon. Ed. Carnes, Hon. Charles R. Wilson, Hon. Peter T. Fay). That Opinion is available online, but is otherwise unpublished.

SUPREME COURT JURISDICTION

This suit was brought by an American citizen against an Italian corporation, to recover for injuries sustained in international waters. The District Court

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[1] Designations beginning "DE" identify the docket entry number of the District Court filing. Appendix notations in lower case, like "8a", refer to documents found in the Appendix to the Petition for Writ of Certiorari. Materials found in the Joint Appendix are designated "JA".

had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1333(1).

On October 28, 2008, the District Court issued its Final Judgment. Petitioner filed her Notice of Appeal on November 17, 2008. She invoked the jurisdiction of the United States Court of Appeals for the Eleventh Circuit under 28 U.S.C. § 1291.

The Court of Appeals issued its Opinion and Judgment on June 22, 2009. The Petition for Writ of Certiorari was filed within 90 days of the Court of Appeals Judgment and was timely under this Court's Rule 13.1. On January 19, 2010, the Court issued its Order granting the Petition.

Petitioner relies on the jurisdiction conferred on this Court by 28 U.S.C. § 1254(1), "Cases in the court of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

This appeal turns on the interpretation and application of Fed. R. Civ. P. 15(c)(1), which states, in full:

> **"Relation Back of Amendments.** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - - or attempted to be set out - - in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

STATEMENT OF THE CASE

In May of 2006, Ms. Krupski purchased passage on the Costa Magica through a travel agent in South Carolina. In January of 2007, the travel agent received "Travel Documents", on which the second page stated (DE 26, Response to Motion for Summary Judgment, Ex. 1; 25a):

"Costa Cruise Lines N.V.
200 South Park Road,
Suite 200
Hollywood, FL 33021-8541"

The Travel Documents were mailed to the travel agent from Italy by Costa Cruise (DE 19, Costa Cruise Motion for Summary Judgment, Ex. 3, Klutz Affidavit, ¶ 14; JA 36). These documents included a cover page (Klutz Affidavit, Ex. B; JA 40) and an eleven page Passenger Ticket (Klutz Affidavit, Ex. B; 27a - 37a).

The definitional section of the ticket (27a) defines "CARRIER" as including, "Costa Crociere S.p.A., an Italian corporation, and all Vessels and other ships owned, chartered, operated or provided by Costa Crociere S.p.A., and all officers, staff members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns on board such Vessels, and the manufacturers of said Vessels, and all their component parts". As a precondition to suit, the ticket requires notice of the injury to the carrier or its agent within 185 days[2], the filing of suit within one year,[3] and service upon the

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[2] 46 U.S.C § 30508(b)(1) allows a vessel operator to contractually require notice no less than six months after the injury. Petitioner complied with the contractual notice requirement by her counsel's letter of July 2, 2007 to Costa Cruise (DE 26, Response to Motion for Summary Judgment, Ex. 5; JA 69a - 70a).

[3] 46 U.S.C. § 30106 establishes a three year limitation period for maritime personal injury actions. However, 46 U.S.C. § 30508(b)(2) permits a contractual limitation period of not less than one year. Petitioner does not challenge the validity of the one year limitation period found in the ticket. In this Brief, the term "statutory limitation period" is used when referring to the

carrier within 120 days of filing[4] (27a - 28a). Other provisions of the ticket limit the carrier's liability (28a - 30a, 36a), and extend the benefit of limitations to the carrier's agents, including "Costa Cruise Lines, N.V., the Netherlands Antilles corporation that is a sales and marketing agent for the CARRIER and the issuer of this Passenger Ticket Contract" (29a). After several pages of additional conditions, the ticket contains a forum selection provision requiring suit in Broward County, Florida for incidents on vessels which departed from the United States (36a).

The ship left Port Everglades, Florida on February 18, 2007. Three days later, on February 21, 2007, Petitioner was injured, falling in the ship's theater. She tripped over a camera cable, suffering a fractured right femur (DE 1, Complaint, ¶ 12; JA 23 - JA 24; DE 31, Amended Complaint, ¶ 13, JA 76 - JA 77).

By letter of July 2, 2007, Krupski's counsel wrote to Costa Cruise in Florida, providing notice of the injury (DE 26, Response to Motion for Summary Judgment, Ex. 5; JA 69 - JA 70). In return, counsel received a letter dated July 9, 2007 from Mr. Klutz of International Risk Services, Inc. ("IRSI") (DE 26, Ex. 6; 23a - 24a), the Claims Administrator retained by Costa Cruise to handle claims by passengers on vessels

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three year period of 46 U.S.C. § 30106. Otherwise, the unqualified term "limitation period" or the phrase "contractual limitation period" refers to the one year period found on the ticket.

[4] The original Complaint (DE 1; JA 21 - JA 28) was served on Costa Cruise within 120 days after filing, and the Amended Complaint (DE 31; JA 73 - JA 84) was served on Costa Crociere within 120 days after filing.

operated by Costa Crociere (DE 19, Ex. 3, Klutz Affidavit, ¶ 2; JA 33 - JA 34). The Klutz letter sought additional information, "[i]n order to facilitate our future attempts to achieve a pre-litigation settlement". The letter bore the heading "Costa" and was sent from Hollywood, Florida (*Id.*). Mr. Klutz identified himself as an agent of IRSI, "As Claims Administrator for Costa Cruise Lines N.V." (*Id.*).

When no settlement was reached, suit was filed against Costa Cruise on February 1, 2008, in the United States District Court for the Southern District of Florida. The case was assigned to Hon. Cecilia A. Altonaga, District Court Judge. Three days after filing, the Complaint was served on CT Corporation System, the Registered Agent for Costa Cruise (DE 3, DE 4).

The Complaint (DE 1; JA 21 - JA 28) asserted liability based on the alleged status of Costa Cruise as the operator of the Costa Magica. It asserted that Ms. Krupski, "was a paying passenger on Defendant's vessel COSTA MAGICA" (DE 1, ¶ 6; JA 22). According to the Complaint, "Defendant COSTA CRUISE owned, operated, managed, supervised and controlled the ocean-going passenger vessel known as the COSTA MAGICA" (DE 1, ¶ 10; JA 23). The Complaint alleged that Costa Cruise was liable, under premises liability principles, for the dangerous conditions on the ship which it operated [DE 1, ¶¶ 13-16, 17 ("its vessel"), 18-19; JA 24 - JA 27].

On February 25, 2008, Costa Cruise filed its Answer (DE 6; JA 29 - JA 32), denying that it was involved in the operation, ownership, or management of the Costa Magica (Answer, ¶ 4; JA 30). It contended

that, in accord with the ticket (attached as an exhibit to the Answer), Costa Crociere was the vessel operator or carrier, and Costa Cruise was its sales and marketing agent (Answer, ¶ 11; JA 31).

Costa Cruise filed its Motion for Summary Judgment on May 6, 2008 (DE 19). The motion was supported by the Affidavit of Mr. Klutz (DE 19, Ex. 3; JA 33 - JA 39). Costa Cruise argued that it was not the "carrier" and was not subject to the duties imposed on the operator of a vessel.

Krupski responded to the Motion for Summary Judgment, seeking leave to amend the Complaint to add Costa Crociere as a defendant (DE 26; JA 41 - JA 55). With that filing, Petitioner presented as exhibits the travel document page with the name and address of Costa Cruise and a picture of an ocean liner (DE 26, Ex. 1; 25a), a printout from the "costacruise.com" website (DE 26, Ex. 2; JA 56 - JA 61), two printouts from the Florida Department of State Division of Corporations website (DE 26, Ex. 3, Ex. 4; JA 62 - JA 68), the notice letter to Costa Cruise (DE 26, Ex. 5; JA 69 - JA 70), and the letter from Mr. Klutz in response (DE 26, Ex. 6; 23a - 24a).

Krupski's counsel explained that he had noted the identification of Costa Cruise, with a Hollywood, Florida address, on page two of the Travel Documents (DE 26; JA 43, JA 49). Looking at the website, he learned that Costa Cruise was the only listed entity with a United States office (DE 26; JA 43 - JA 44, JA 49). The Florida Department of State webside confirmed that Costa Cruise was the only active "Costa" company registered to do business in the State (DE 26; JA 44 - JA 45, JA 49 - JA 50). His notice letter

to Costa Cruise and the response seemingly confirmed that Costa Cruise was the appropriate defendant (DE 26; JA 45).

Citing Fed. R. Civ. P. 15, Krupski sought to amend the Complaint to add Costa Crociere as a Defendant (DE 26; JA 47 - JA 48, JA 51 - JA 52). Her counsel recognized that the question of relation back would arise, but suggested that the question was not yet ripe for decision (DE 26, fn. 1; JA 52).

Following oral argument (DE 57, transcript of July 2, 2008 argument; JA 124 - JA 145), Judge Altonaga denied the Costa Cruise Motion for Summary Judgment without prejudice and granted the Motion for Leave to Amend (DE 30; JA 71 - JA 72). The Order, entered July 2, 2008, required service on Costa Crociere by September 16, 2008 (*Id.*).

The Amended Complaint (DE 31; JA 73 - JA 84) was filed on July 11, 2008 and served pursuant to the Hague Convention on August 21, 2008 (DE 43, Costa Crociere Motion to Dismiss; JA 88 - JA 89). It alleged that Costa Crociere was the operator of the vessel and was liable for its negligent breach of the duties imposed on a vessel operator (DE 31, ¶¶ 21-23; JA 80 - JA 83).

On September 3, 2008, Costa Crociere filed its Motion to Dismiss (DE 43; JA 87 - JA 101), represented by the same attorney who had formerly

represented Costa Cruise.[5] Ms. Krupski filed her Response to the Costa Crociere Motion on September 15, 2008 (DE 47; JA 102 - JA 112). Costa Crociere replied to that response with its filing of September 24, 2008 (DE 48; JA 113 JA - JA 123). Thus was framed the issue now before this Court: whether the Amended Complaint against Costa Crociere relates back under Fed. R. Civ. P. 15(c)(1)(C) to the original Complaint against Costa Cruise such that Petitioner's claims against Costa Crociere are not barred by the one year contractual limitation period.

It was agreed that the criterion of Rule 15(c)(1)(B) ("ari[sing] out of the conduct, transaction, or occurrence set out . . . in the original pleading") was satisfied. The dispute focused on the criteria of Rule 15(c)(1)(C)(i) ("[the added party] received such notice of the action that it will not be prejudiced in defending on the merits") and 15(c)(1)(C)(ii) ("[the added party] knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity").

Dispensing with oral argument, on October 21, 2008, Judge Altonaga issued her Order (DE 50; 8a-22a). She found that Respondent received timely constructive notice due to its sufficient "identity of interest" with Costa Cruise and their shared counsel (14a - 17a). However, the District Court concluded that there was no "mistake" in failing to name Respondent Costa Crociere earlier because "the newly

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[5] By this time, Costa Cruise was no longer in the case, having been dismissed by stipulation (DE 41) and Order of August 21, 2008 (DE 42; JA 85 - JA 86).

added defendants were known to the plaintiff before the running of the statute of limitations" (19a - 20a). She based this conclusion on the ticket's identification of Costa Cruise as the sales and marketing agent, and on the submissions of Costa Cruise (Answer, Corporate Disclosure Statement and Motion for Summary Judgment), filed after expiration of the one year period.

On appeal, the Court of Appeals affirmed, again without oral argument (1a - 7a). Its principal rationale was that Respondent was identified as "carrier" on page one of the eleven page Passenger Ticket (6a), thus, "The identity and knowledge of Costa Crociere as a potential party [before filing suit] must be imputed to Krupski and her counsel" (6a), and the identification of Costa Cruise, instead of Respondent, in the original suit, was therefore a "deliberate decision" rather than a "mistake" (5a - 6a). Additionally, the Court noted the delay in filing the Amended Complaint as a further reason why Rule 15(c) was inapplicable, "even assuming that she first learned of Costa Crociere's identity as the correct party from Costa Cruise's Answer (filed on February 25, 2008)" (7a).

Ms. Krupski then sought Supreme Court review. By Order of January 19, 2010, the Court granted her Petition for Writ of Certiorari. She now files this Brief on the merits.

SUMMARY OF ARGUMENT

Fed. R. Civ. P. 15(c)(1)(C) seeks to permit the addition of new defendants, when the purposes of limitation statutes are not compromised. The

guardians of limitation policies are found in the requirements of subsection (i) ("notice" and "not prejudiced"). Here, the District Court correctly found, and the Circuit Court did not disagree, that Costa Crociere received the timely notice and absence of prejudice required by subsection (i). See Argument I B.

The rulings of the District Courts and Circuit Courts of the Nation are divergent on some aspects of the meaning and application of Rule 15(c)(1)(C). The more persuasive authorities recognize, as should this Court, that where the "notice" and "not prejudiced" requirements of subsection (i) are met, and the added defendant "knew or should have known" that it was an intended target of the Complaint, the "mistake" criterion of subsection (ii) does not create a separate hurdle. So long as the error was "concerning the proper party's identity", it is a "mistake" within the meaning of the Rule and relation back is available. See Argument I C (1).

In the instant case, Ms. Krupski sought to file suit against the operator of the Costa Magica for breach of the legal duties imposed on the vessel operator. Her error in misidentifying the operator as Costa Cruise rather than Costa Crociere was a "mistake concerning the proper party's identity". The overwhelming weight of authority recognizes that when the initial suit seeks recovery from the entity whose status gives rise to the legal obligations at issue, an amendment to add the entity actually occupying that status relates back to the earlier suit against an affiliated company with a similar sounding name. This Court should reach the same conclusion. See Argument I C (2).

In denying relation back, the lower courts relied on information provided by Costa Cruise, after suit was filed, as proof that there was no "mistake" in omitting Costa Crociere from the initial Complaint. If the knowledge of the plaintiff is germane to the question of "mistake", it is the actual knowledge possessed before the initial suit was filed. Information obtained after the one year period has already expired is irrelevant to the inquiry. See Argument I C (3).

The principal rationale of the Circuit Court was that Petitioner had "imputed" "knowledge" of the existence of Costa Crociere pre-suit, because it was mentioned within the definition of "CARRIER" on the ticket. This observation simply confirms and identifies the mistake made by Petitioner's counsel in not reading that portion of the ticket or grasping its significance. A mistake of this nature is precisely what Rule 15(c)(1)(C) addresses, "a mistake concerning the proper party's identity" for which the Rule allows relation back. Like other courts have done, this Court should reject the notion that relation back is inapplicable whenever there was information available from which the plaintiff's counsel could have discerned the name of the correct defendant pre-suit. The rationale of the Circuit Court (essentially that those who make a mistake are excluded from a Rule forgiving of mistakes) is at odds with the guiding spirit of the Federal Rules of Civil Procedure and, if embraced, would render Rule 15(c)(1)(C) impotent to accomplish its intended purpose. See Argument I C (3).

ARGUMENT

I. PETITIONER, WHO WAS INJURED ON THE COSTA MAGICA, AN OCEAN-GOING VESSEL, FILED SUIT SEEKING RECOVERY FROM THE VESSEL OPERATOR FOR BREACH OF THE LEGAL DUTIES IMPOSED ON A VESSEL OPERATOR. SUIT WAS FILED AGAINST COSTA CRUISE, THE BOOKING AND SALES AGENT, RATHER THAN ITS AFFILIATE, COSTA CROCIERE, THE ACTUAL OWNER AND OPERATOR OF THE COSTA MAGICA. FED. R. CIV. P. 15(c)(1)(C) PERMITS AN AMENDED COMPLAINT TO "RELATE BACK", FOR LIMITATION PURPOSES, WHEN THE AMENDMENT CORRECTS A "MISTAKE CONCERNING THE PROPER PARTY'S IDENTITY". THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN UPHOLDING DENIAL OF "RELATION BACK" ON THE GROUND THAT THERE CAN BE NO SUCH "MISTAKE" WHERE THE PLAINTIFF HAS "IMPUTED" KNOWLEDGE OF THE IDENTITY OF THE ADDED DEFENDANT PRIOR TO SUIT BY ITS IDENTIFICATION AS "CARRIER" IN THE ELEVEN PAGE TICKET

To place the issue in perspective, this Argument provides an overview of relation back under Fed. R. Civ. P. 15 (c)(1)(C) (sub-section A, *infra*). Here, the lower courts correctly recognized that the policies behind the limitation period were satisfied : Petitioner met the "timely notice" and "not prejudiced"

requirements of Rule 15(c)(1)(C)(i) (sub-section B, *infra*). The lower courts erred in nonetheless denying relation back on the ground that the ticket's definition of "carrier" provided Petitioner with pre-suit "imputed" "knowledge" of Respondent (sub-section C, *infra*). Although there is some lack of uniformity in the decisions of other Circuit and District Courts [C (1), *infra*], the weight of authority permits relation back in "mistaken identity" cases like this [C (2), *infra*]. The reasoning of the courts below should be rejected, as it is flawed in several respects [C (3), *infra*].

A. An Overview Of Relation Back Under Fed. R. Civ. P. 15(c)(1)(C) And The Controlling Factors

"Relation back" under Rule 15(c)(1)(C) is intended, "to ameliorate the effect of a statute of limitations where the plaintiff has sued the wrong party but where the right party has had adequate notice of the institution of the action". ***Bloomfield Mech. Contracting, Inc. v. Occupational Safety and Health Review Comm'n*, 519 F.2d 1257, 1262 (3rd Cir. 1975)**, citing 6 Wright & Miller, Federal Practice and Procedure §§ 1497-1500 at 489-523 (1971). Accord: ***Dutka v. Southern R. Co.*, 92 F.R.D. 375 (N.D. Ga. 1981)**; ***Mitchell v. CFC Fin. LLC*, 230 F.R.D. 548, 549-550 (E.D. Wisc. 2005)**. Relation back has been recognized and applied by this Court since before the adoption of the Federal Rules of Civil Procedure. ***Scarborough v. Principi*, 541 U.S. 401, 418 (2004)**, citing the Advisory Committee's 1937 Note regarding Rule 15(c), which described "relation back" as "a well recognized doctrine of recent and now more frequent application".

In the past decade, the Court has adopted or approved "relation back", or its functional equivalent, to prevent dismissal of claims for inconsequential errors. ***Scarborough*** [allowing amendment to a fee application under the Equal Access to Justice Act where the fee application, filed within the 30 day deadline of 28 U.S.C. § 2412(d)(1)(B), lacked the requisite allegation that "the position of the United States was not substantially justified"]; ***Edelman v. Lynchburg College*, 535 U.S. 106, 115-116 (2002)** [upholding a regulation of the Equal Employment Opportunity Commission, treating a timely charge of employment discrimination which lacks the "oath or affirmation" required by 42 U.S.C. § 2000e - 5(b) as curable by relation back of a sworn amendment]; ***Becker v. Montgomery*, 532 U.S. 757 (2001)** (when a timely notice of appeal is filed without the required signature, the error can be cured by a signature provided after the deadline for appealing).

***Schiavone v. Fortune*, 477 U.S. 21 (1986)** was a defamation suit arising out of an article in Fortune magazine published by Time, Incorporated. The initial suit was filed against "Fortune", a trademark and the name of a division of Time (**477 U.S. at 22-23**). Service of the initial complaint, "was attempted only after [the limitation period] had expired" (**477 U.S. at 25**). The predecessor version of Rule 15 then in effect required, for relation back, that the added party had received notice "within the period provided by law for commencing the action against him" (**477 U.S. at 24**); *i.e.* **service** of the initial complaint within the limitation period. Applying this language literally, the Court concluded that the suit was properly dismissed, despite the relationship between "Fortune" (the named defendant) and "Time, Inc." (the proper defendant),

since the complaint was not served within the limitation period (**477 U.S. at 29**):

> "Timely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party. In this case, however, neither Fortune nor Time received notice of the filing until after the period of limitations had run. Thus, there was no proper notice to Fortune that could be imputed to Time."

In reaction to ***Schiavone***, which was regarded as taking a narrow view of relation back inconsistent with the guiding spirit of the Federal Rules,[6] Fed. R. Civ. P. 15(c) was amended effective December 1, 1991. ***Hill v. United States Postal Serv.*, 961 F.2d 153, 154-155 (11th Cir. 1992)**. With the amendment, it is

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[6] The Advisory Committee Notes regarding the 1991 amendment state as to paragraph (c)(3) (which was later revised stylistically to the current form):

> "This paragraph has been revised to change the result in *Schiavone v. Fortune, supra*, with respect to the problem of a misnamed defendant. . . . On the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8. See Bauer, Schiavone: *An Un-Fortune ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 Notre Dame L.Rev. 720 (1988); Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S.Cal.L.Rev. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons For Civil Rules Revision*, 86 Mich.L.Rev. 1507 (1987)."

now sufficient for relation back if the added defendant received notice, "within the time period provided by Rule 4(m)", Fed. R. Civ. P. 15(c)(1)(C); that is, "within 120 days after the complaint is filed".

The ultimate outcome in ***Schiavone*** turned on a provision of Rule 15 which has since been repealed. However, the comments in the majority and dissenting opinions have continued importance in elucidating the purpose, meaning, and application of the unchanged features of Rule 15.

The ***Schiavone*** Court recited the "worthy goals and loftily stated purposes" found in Rules 1, 8(f) and 15(c) and its earlier decisions (**477 U.S. at 27**):

> "As amended, *Rule 1 of the Federal Rules of Civil Procedure* states: 'These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.' *Rule 8(f)* says: 'All pleadings shall be so construed as to do substantial justice.' And Justice Black reminded us, more than 30 years ago, in connection with an order adopting revised Rules of this Court, that the 'principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts.' *346 U.S. 945, 946 (1954)*.
>
> This Court, too, in the early days of the federal civil procedure rules, when *Rule 15(c)*, see n. 5, *supra*, consisted only of what is now its first sentence, announced that the spirit and inclination of the rules favored decisions on the merits, and rejected an approach that pleading

> is a game of skill in which one misstep may be decisive. *Conley v. Gibson, 355 U.S. 41, 48 (1957).* It also said that decisions on the merits are not to be avoided on the basis of 'mere technicalities.' *Foman v. Davis, 371 U.S. 178, 181 (1962).*"

Justice Stevens, writing for himself and his dissenting colleagues, disagreed with the majority Opinion, noting its inconsistency with the spirit and purpose of Fed. R. Civ. P. 15(c) (***Schiavone*, 477 U.S. at 32-33, 38-39**):

> "In my view, the Court's decision represents an aberrational - - and, let us hope, isolated - - return to the 'sporting theory of justice' condemned by Roscoe Pound 80 years ago.
>
> * * *
>
> The principal purpose of *Rule 15(c)* is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way. That purpose is defeated - - and the Rule becomes largely superfluous - - if it is construed to require the correction to be made before the statute has run. Moreover, the specific liberalizing purpose of the 1966 amendment to the Rule is frustrated if the added language is construed to cut back on the number of cases in which relation back is permitted" (footnote omitted).

The ***Schiavone*** majority identified three factors in the relation back analysis (and a fourth which has been eliminated by the 1991 amendment) (**477 U.S. at 29**):

> "(1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; [and] (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it."

These three criteria identified in ***Schiavone*** have since been acknowledged as a blueprint of the necessary analysis. ***Makro Capital of Am., Inc. v. UBS, AG*, 543 F.3d 1254, 1258 (11th Cir. 2008); *Goodman v. Prax Air, Inc.*, 494 F.3d 458, 467 (4th Cir. 2007)(*en banc*).** In the instant case, the parties, District Court, and Circuit Court are all in agreement on the three controlling inquiries (4a - 5a; 14a - 21a).

The parties and lower courts are also in agreement that the amendment adding Costa Crociere satisfies Rule 15(c)(1)(B) ("asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading"). Consequently, the dispute has narrowed to subsections (i) and (ii) which accomplish relation back when the added party:

> "(i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

B. The Lower Courts Correctly Recognized That, Through Its Relationship With Costa Cruise And Their Shared Counsel, Costa Crociere "Received Such Notice Of The Action That It Will Not Be Prejudiced In Defending On The Merits"

As the Advisory Committee Note regarding the 1966 Amendment reflects, "[r]elation back is intimately connected with the policy of the statute of limitations". The purpose of limitation statutes is, of course, to assure that a defendant has timely notice of, and an opportunity to defend against, a suit against it. See ***Schiavone*, 477 U.S. at 35-36** (Stevens, J., dissenting). This core policy is protected in the relation back context by subsection (i), which requires that the added defendant, within the time for service of the original complaint, "received such notice of the action that it will not be prejudiced in defending on the merits".

Here, pre-suit notice was provided to IRSI, the service retained by Respondent's agent, Costa Cruise, to investigate and resolve claims arising on vessels operated by Respondent. The initial suit, seeking recovery from the vessel operator (misidentified as Costa Cruise), was served on Respondent's booking and sales agent, and corporate affiliate, Costa Cruise.[7]

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[7] While the record reflects their operational relationship, it does not show the precise corporate relationship between Costa Cruise and Costa Crociere. The Corporate Dislosure Statement in Respondent's Court of Appeals Brief identified Carnival Corporation, Carnival PLC, Costa Cruise, Costa Crociere, eight

From the outset, the suit was defended by Mr. Horr, who later represented Respondent.[8]

The "notice" required by subsection (i) need not be formal[9] or actual. Informal or constructive notice will suffice. ***Kirk v. Cronvich*, 629 F.2d 404, 407-408 (5th Cir. 1980); *Wine v. EMSA Limited P'ship*, 167 F.R.D. 34, 38 (E.D. Pa. 1996)** ("actual, constructive, or imputed notice"); ***Dutka, supra*, 92 F.R.D. at 378** ("Rule 15(c) does not require actual notice to be given to the party to be brought in by amendment . . . constructive notice on such party would be sufficient").

As ***Schiavone*** noted (**477 U.S. at 29**), timely commencement and service of suit on the initial defendant, "permit imputation of notice to a subsequently named and sufficiently related party". Later cases recognize that the requisite constructive or

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other "Costa" companies, and IRSI among those with a financial interest in the outcome.

[8] Attorney-client priviledge concerns preclude inquiry into defense counsel's communications with Costa Crociere. Perhaps for this reason, representation of both an initial defendant and an added defendant is regarded as evidence of notice and lack of prejudice to the added defendant, particularly when the initial defendant and added defendant are business affiliates. See *e.g.* ***Sanders-Burns v. City of Plano*, ___ F.3d ___ (5th Cir. 2010) (2010 U.S. App. LEXIS 2534, Ct. of App. # 08-40459, *rel'd* 1/11/10); *Chumney v. U.S. Repeating Arms Co., Inc.*, 196 F.R.D. 419, 430 (M.D. Ala. 2000); *Younger v. Chernovetz*, 792 F. Supp. 173, 176 (D.C. Conn. 1992); *Taliferro v. Costello*, 467 F. Supp. 33, 35 (E.D. Pa. 1979).**

[9] The Advisory Committee Notes to the 1966 Amendment, quoted in ***Schiavone*** (**477 U.S. at 31**), reflect that, "the notice need not be formal".

imputed knowledge exists when there is a substantial identity of interest between the original party and the added party. ***Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998)** ("Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other"); ***Bowden v. Wal Mart Stores, Inc.*, 124 F. Supp. 2d 1228, 1242 (M.D. Ala. 2000); *Koal Indus. Corp. v. Asland S.A.*, 808 F. Supp. 1143, 1156-1157 (S.D.N.Y. 1992).**

As a result, corporate affiliates have a substantial "identity of interest" for Rule 15 purposes, such that timely notice to the original defendant constitutes notice to the related added defendant. ***Dutka, supra; Koal Indus., supra; Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1408, fn. 5 (11th Cir. 1998); *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F.3d 1498, 1502-1503 (9th Cir. 1994).**

Similarly, service on an agent (such as Costa Cruise) is deemed sufficient notice to the added principal (here, Respondent). ***Kirk v. Cronvich, supra; Mitchell v. Hendricks*, 68 F.R.D. 564 (E.D. Pa. 1975); *Washington v. T.G. & Y. Stores Co.*, 324 F. Supp. 849, 853 (W.D. La. 1971); *Ramirez v. Burr*, 607 F. Supp. 170, 174 (S.D. Tex. 1984).**

Costa Cruise and Costa Crociere, two corporate affiliates with similar names, are engaged together in a cruise ship venture. Costa Cruise conducts the booking and management aspect of the business, while Costa Crociere operates the vessel, in an undertaking for the mutual profit of the two "Costa" companies, with Costa Cruise serving as the United States

presence. The travel documents were provided by Costa Cruise and prominently featured the Costa Cruise name. When Petitioner's pre-suit notice was presented, Costa Cruise and the claims adjustor it retained accepted the notice without protest and intimated that Costa Cruise was in a position to settle. These facts fully support the trial court's conclusion that the notice provided by the initial suit served on Costa Cruise likely came to the knowledge of, or provided imputed or constructive notice to, Costa Crociere. Thus, the trial judge correctly held that Costa Crociere received, through the filing of the initial Complaint against Costa Cruise, "such notice of the action that it will not be prejudiced in defending on the merits", the requirement of Rule 15(c)(1)(C)(i) (14a - 18a).

The Court of Appeals had no occasion to question that conclusion. Neither should this Court.

C. Petitioner Sought To Sue The Operator Of The Vessel On Which She Was Injured. The Initial Complaint Misidentified The Operator As Costa Cruise, Respondent's Affiliate. This Is A "Mistake Concerning The Proper Party's Identity" Within The Meaning Of Fed. R. Civ. P. 15(c)(1)(C)(ii) Permitting Relation Back Of An Amended Complaint Against Respondent Costa Crociere, The Actual Operator. The Fact That Petitioner's Counsel Could Have Discerned From The Ticket That Respondent Was The

"Carrier" Does Not Disentitle Petitioner To Relation Back

Both the initial Complaint and Amended Complaint were filed and served within all established deadlines. The very purpose of the Federal Rules of Civil Procedure, particularly Rules 1[10] and 8(e),[11] is to promote the resolution of disputes on their substantive merits, overlooking imperfections which do not affect substantive rights. ***Conley v. Gibson*, 355 U.S. 41, 48 (1957); *Schiavone*, 477 U.S. at 27.** Similarly, the purpose of Fed. R. Civ. P. 15(c)(1)(C) is to avoid the harsh effect of a limitations period when the policies underlying limitation periods are not compromised. This case falls squarely within the intended remedial purpose of Rule 15(c)(1) (C).

The lower courts nonetheless denied Petitioner the benefit of "relation back". In their view, Petitioner failed to qualify under subsection (ii), which looks to whether the added party, "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity".

Parsing that phrase, the portion preceding the comma asks whether the added party had reason to understand that it was an intended target of the suit ("knew or should have know that the action would

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[10] In pertinent part, Fed. R. Civ. P. 1 provides that, "These rules . . . should be construed and administered to serve the just, speedy, and inexpensive determination of every action and proceeding".

[11] Fed. R. Civ. P. 8(e) teaches that, "Pleadings must be construed so as to do justice".

have been brought against it"). Understandably, the District Court and Circuit Court did not rest their decision on this portion of subsection (ii).

The initial Complaint (DE 1; JA 21 - JA 28) sought redress from the operator of the vessel, based on the allegation that it failed to fulfill the legal duties imposed on a vessel operator. Knowing that it was the vessel operator, not Costa Cruise, Respondent "knew or should have known that the action would have been brought against it" if Petitioner's counsel realized the correct identity of the operator.

The outcome instead turned on the second half of the phrase: "but for a mistake concerning the proper party's identity". The meaning and application of the term "mistake" is the central area of dispute in this Court.

In construing and applying subsection (ii), the courts around the Country have issued decisions which are harmonious in part, but conflicting in some particulars. Under the better view, if the "notice" and "not prejudiced" requirements of subsection (i) are met, and if the added defendant "knew or should have known" that it was an intended target, "mistake" should be construed broadly, to avoid creating an independent bar to recovery, divorced from the policies behind limitation periods (sub-section 1). Under any reasonable construction of the Rule, the amendment sought in this case - - substitution of the actual "Costa" vessel owner for its agent, a related "Costa" corporation, when the suit targeted the vessel owner from the outset - - is a "mistake concerning the proper party's identity" (subsection 2). In reaching a contrary conclusion, the courts below engaged in an analysis

which is flawed in many respects, primarily in adopting an " 'imputed' 'knowledge' refutes 'mistake' " approach which effectively precludes relation back when the plaintiff makes a mistake in failing to properly identify the proper party initially (subsection 3).

(1) Despite A Lack Of Uniformity Among The Lower Courts Regarding, "A Mistake Concerning The Proper Party's Identity", The Phrase Is Best Construed Broadly, To Permit Relation Back Where The Policies Of The Statute Of Limitations Are Satisfied

As might be expected, "relation back" decisions are fact-specific and sometimes conflicting. Summaries and discussions of these variations can be found in 3-15 Moore's Federal Practice - - Civil § 15.19[d], in Engrave, *Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c)*, 89 Calif. L.Rev. 1549 (2001) (*"Previously Unnamed Defendants"*), and in Sparling, Note: *Relation Back of "John Doe" Complaints in Federal Court: What You Don't Know Can Hurt You*, 19 Cardozo L.Rev. 1235 (1997). A review of the areas of agreement and disagreement help shape the controversy over the meaning of "mistake".

(a) The Lower Court Decisions Regarding The Meaning Of "Mistake"

It is generally recognized that, so long as the "notice" and "prejudice" features of subsection (i) are satisfied, relation back is appropriate in cases of "misnomer", the "mistake" most obviously addressed by the Rule. As Moore's Federal Practice explains:

> "The classic example of mistake is misnomer; that is, when a plaintiff misnames or misidentifies a party in its pleadings but correctly serves that party. In these cases, relation back is appropriate because the defendant is already before the court. For example, a court may find misnomer when the proper corporate name is not easily attainable and the name used is close enough to the correct corporate name for the newly-named defendant to know that it was being sued. Misnomer may also apply, for example, when a plaintiff names a corporation instead of a partnership, a parent corporation instead of a subsidiary, a building instead of its corporate owner, or a corporation in liquidation instead of its successor. In some cases a legal mistake can lead to misnomer, as when a plaintiff names an institutional defendant because of confusion as to whether an individual or an institutional defendant is the proper party, but the individual is properly served and, therefor has notice of the mistake."

In "*Previously Unnamed Defendants*", the author uses the term "misnomer" to describe inaccuracies in the name of a party already before the Court (89

Cal.L.Rev. at 1564). A different term, "mistaken identity",[12] is used to describe a suit based on a status giving rise to liability which erroneously names a defendant that does not have that status and is amended to add the correct entity (89 Cal.L.Rev. at 1565).[13]

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[12] Using this terminology, Petitioner contends that this is a case of "mistaken identity". She sought to sue the operator of the Costa Magica, but mistakenly identified Costa Cruise rather than Costa Crociere as the "Costa" entity having that status.

[13] The author describes "mistaken identity" in this fashion:

> "Here, the plaintiff initially names B as a defendant, believing it to have characteristics U, V, and W that make it the legally liable party according to the substantive law governing the action. The plaintiff later learns that B does not have characteristics U, V, and W and hence cannot be liable, but another entity, C, has those characteristics and is therefore potentially liable.
>
> [T]his situation could arise in the following way. Sally is injured when the car she is driving is struck by another car. At the scene, the driver of the other car, Wayne Johnsen, mentions that the car is owned by his friend. Sally brings suit against Wayne and the friend, accomplishing service close to 120 days after the statute of limitations has run. Wayne's friend answers after the period is over, revealing that the car actually belongs to his girlfriend. Sally seeks leave to amend to substitute in the girlfriend. All along Sally has intended to sue the owner of the car (in addition to the driver); she just was mistaken as to the identity of the car's owner."

The Advisory Committee Notes to the 1966 amendment reflect that the new language clarified the availability of relation back to changes "including an amendment to correct a misnomer or misidentification of a defendant". Based on this language, courts have sometimes sought to limit the remedial purpose of the Rule to classic cases of "misnomer" or "misidentification". Other decisions differentiate between kinds of "mistake", *e.g.* ***Mitchell v. CFC Fin. LLC, supra,* 230 F.R.D. at 549-550.** In some cases, the term has been construed broadly enough to include mistakes of legal judgment or mistakes of law. ***Taliferro, supra; Employees Sav. Plan of Mobil Oil v. Vickery*, 99 F.R.D. 138, 143 (S.D.N.Y. 1983); *Jackson v. Kotter*, 541 F.3d 688, 696 (7th Cir. 2008).** In ***Rendall-Speranza v. Nassim*, 107 F.3d 913, 918 (D.C. Cir. 1997),** the Court rejected that view.

Most courts take a broad view of "mistake". See *e.g.* ***Advanced Power Sys., Inc. v. Hi-Tech Sys., Inc.*, 801 F. Supp. 1450, 1457 (E.D. Pa. 1992); *Sendobry v. Michael*, 160 F.R.D. 471 (M.D. Pa. 1995); *Soto v. Corr. Facility*, 80 F.3d 34, 36 (2nd Cir. 1996); *Woods v. Indiana Univ.-Purdue Univ.*, 996 F.2d 880, 887 (7th Cir. 1993)** ("mistake, as used in Rule 15(c), applies to mistakes of law as well as fact"); ***Goodman, supra,* 494 F.3d at 470** ("the text of Rule 15(c)(3) does not support . . . parsing of the 'mistake' language"); ***Roberts v. Michaels*, 219 F.3d 775, 778 (8th Cir. 2000)** ("the principle [of relation back] has been applied more broadly [than classic misnomer]");***Williams v. Transp. of Canada, Ltd.*, 57 F.R.D. 53, 55 (D.C. Nev. 1972)** ("A mistake within the meaning of the rule exists whenever a party who may be liable for the actionable conduct alleged in the complaint was omitted as a party defendant"); ***Itel***

***Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1258, fn. 9 (11th Cir. 1983).**

Some courts have suggested that culpability by the plaintiff is a factor to be considered in denying relation back. For example in ***Phillip v. Sam Finley, Inc.*, 270 F. Supp. 292, 294 (W.D. Va. 1967)**, the court noted that, "[the] failure to discover the proper defendant is plaintiff's own doing and is not caused by any mis-conduct of the defendant". A later decision from that district, ***Bruce v. Smith*, 581 F. Supp. 902, 906 (W.D. Va. 1984)**, cited, "Plaintiff's own inexcusable neglect" as a proper consideration in assessing prejudice to the new defendant.

The majority view declines to infuse "mistake" with degrees of blameworthiness. ***Staggers v. Otto Gerdau Co.*, 359 F.2d 292, 293 (2nd Cir. 1966)** (allowing relation back despite "a series of egregious errors committed by plaintiff's attorney"); ***Tenay v. Culinary Teachers Ass'n*, 225 F.R.D. 483, 486 (S.D. N.Y. 2005)** (although plaintiff was remiss in failing to file suit earlier, "given the language of Rule 15(c), that observation is of no moment"); ***DeCoelho v. Seaboard Shipping Corp.*, 535 F. Supp. 629, 637 (D.C. P.R. 1982)** (allowing amendment, although, "plaintiffs' neglect requires that they be sanctioned").

As explained in ***Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000)** and ***Centuori v. Experian Information Solutions, Inc.*, 329 F. Supp. 2d 1133, 1138 (D.C. Ariz. 2004)**:

> "[T]he language of Rule 15(c)(3) does not distinguish among types of mistakes concerning identity. Properly construed, the rule

> encompasses both mistakes that were easily avoidable and those which were serendipitous."

One body of law adopts the view that "ignorance" precludes relation back. ***Baskin v. City of Des Plaines*, 138 F.3d 701, 704 (7th Cir. 1998)** ["Rule 15(c)(3) does not permit relation back where there is a lack of knowledge of the proper party"]; ***Wayne v. Jarvis*, 197 F.3d 1098, 1103 (11th Cir. 1999)** ("ignorance does not equate to misnomer or misidentification"; "[the plaintiff's] lack of knowledge regarding the identities of the deputy sheriffs was not a 'mistake concerning the identity of the proper party'"); ***Vineyard v. County of Nassau*, 329 F. Supp. 2d 364 (E.D.N.Y. 2004).** According to the Circuit Court decision in this case (6a), "imputed" "knowledge" is also a basis for denying relation back.

The line of authority regarding "ignorance" arises primarily in the context of "John Doe" suits, often brought pursuant to 42 U.S.C. § 1983. In that setting, the plaintiff may not know the name of the police officer involved, so suit is filed against "John Doe" with the hope to identify the claimed wrongdoer in discovery, then add the officer by name. In this context, relation back is frequently denied, sometimes with the explanation that ignorance of the name of the intended defendant is not a "mistake concerning the proper party's identity". See *e.g.* ***Sassi v. Breier*, 584 F.2d 234 (7th Cir. 1978); *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir. 1996).**

Even in that context, some courts have focused on the question of whether the intended defendant, "knew or should have known that the action would have been brought against it". If so, the timely notice is deemed

sufficient to satisfy the requirement of subsection (ii). See *e.g.* ***Yellow Bird v. Barnes*, 82 F.R.D. 738 (D.C. Neb. 1979); *Varlack v. SWC Carribean, Inc.*, 550 F.2d 171 (3rd Cir. 1977); *Heinly v. Queen*, 146 F.R.D. 102, 107 (E.D. Pa. 1993).**

The Moore's treatise endorses a broad construction of "mistake":

> "The courts that take a broad view of the mistake requirement have the better-reasoned approach. A court should not limit its findings of mistake merely to cases of misnomer. Rather it should consider whether the new party knew that the failure to include it in the original complaint was an error rather than a deliberate strategy. While courts have focused on the mistake requirement in determining whether an amendment relates back, the more important considerations are (1) whether the new party received sufficient notice of the action to avoid prejudice, and (2) whether the new party knew or should have known that it was an intended party".

Relation back is ordinarily not allowed when a plaintiff, with full actual knowledge of a potential defendant and its role, makes a deliberate tactical judgment not to sue that entity, then later has a change of heart after expiration of the limitation period. ***Harris v. E.F. Hauserman Co.*, 575 F. Supp. 749 (N.D. Ohio 1983); *Loveall v. Employer Health Servs., Inc.*, 196 F.R.D. 399, 403 (D.C. Kan. 2000).** In that setting, the failure to sue the entity known to be responsible is deemed a conscious choice rather than a "mistake".

While this result is sometimes thought to flow from the meaning of "mistake" (the opposite of a deliberate tactical choice), it is better explained on the ground that where it is evident that a conscious decision was made not to sue a known potential defendant, it is the **first** prong of subsection (ii) which is unsatisfied. As Moore's explains:

> "This result is also justified on the ground that, when the plaintiff sues one possible defendant but not another, the second defendant has no reason to believe that it was an intended party or, in other words, the second defendant does not possess actual or constructive knowledge that the action would have been brought against it, 'but for a mistake concerning the proper party's identity.' "

(b) A Suggested Construction Of "Mistake Concerning The Proper Party's Identity"

Under any reasonable construction of the Rule, the amendment in this case, substituting one "Costa" entity for another in a suit against the vessel operator, satisfies the "mistake" standard of Rule 15(c)(1)(C)(ii) (subsection 2, *infra*). To the extent that the Court wishes to address the meaning of the Rule more generally, Petitioner offers the following thoughts.

The current uncertainty leads to results which are difficult or impossible to reconcile. Some deserving plaintiffs seeking redress are barred from the courthouse steps for errors that are inconsequential. In the process, potential defendants are encouraged to conduct their affairs in a way that is, at worst, a

corporate shell game and, at best, confusing to the citizens with whom they interact.

With a miserly construction of the "mistake" clause, counsel for a plaintiff may feel impelled to sue all related corporations, expecting to sort them out later. If this occurs, unnecessary energy and cost is expended by the court and counsel alike, with the prospect of satellite Rule 11 litigation looming on the horizon.

The legal merits of a broad construction of "mistake" are aptly discussed by the commentators and the lower court decisions. Petitioner submits that the approach to be taken should deny relation back only where it would offend the policies underlying limitation statutes. Otherwise, the "mistake" clause should not create a separate hurdle.

The general remedial purpose of Rule 15 is critical. That purpose is subordinated, if at all, only to the policies underlying statutes of limitations; policies protected by the "notice" and "prejudice" features of subsection (i) and the "knew or should have known" clause of subsection (ii). Where those criteria of Rule 15(c)(1)(C) are satisfied, there is no remaining reason to deny relation back. The "mistake" clause of subsection (ii) should be broadly construed, to avoid erection of a separate hurdle to recovery, disconnected from the "notice" and "prejudice" concerns of limitation statutes generally and Rule 15 (c)(1)(C) particularly.

The language of the "mistake" clause contains a single qualification, "concerning the identity of the proper person". So long as the error meets that qualification, it suffices under the plain language of the Rule. The Court should reject efforts to classify or

compartmentalize "mistakes" or to exclude types of "mistakes". Provided that the notice and prejudice standards are met, an error "concerning the identity of the proper party" qualifies for relation back, regardless of whether the error is called a "mistake of fact", "mistake of law", "tactical mistake", "mistake in judgment" or any other conceivable sub-class of "mistake".

Any narrow construction of "mistake" is inherently at odds with the guiding spirit of Rule 15(c)(1)(C). A narrow construction would also mire the courts in the unnecessary and unproductive effort to sort "mistakes" into categories, withholding relief for some "mistakes" and granting it for others. The efforts of the judiciary and parties can better be directed to resolving disputes on their substantive merits.

(2) When Petitioner Sought To File Suit Against The Operator Of The Ship On Which She Was Injured, But Erroneously Named Costa Cruise, The Booking Agent, Rather Than Its Affiliate, Respondent Costa Crociere, This Constitutes A "Mistake Concerning The Identity Of The Proper Party"

The courts below focused on why Petitioner's counsel sued Costa Cruise rather than Costa Crociere initially. There was no evidentiary hearing or other

formal proof-taking process in the District Court.[14] However, Petitioner filed the documents her counsel had consulted (DE 26, Response to Motion for Summary Judgment, Exs. 2, 3, 4; JA 56 - JA 68) to explain his effort to identify the "Costa" entity operating a vessel in Florida, and counsel explained himself in the body of the Response to the Motion for Summary Judgment (JA 43 - JA 45, JA 49 - JA 50).

The Complaint itself, the contemporaneous filing which set forth the basis for seeking recovery, provides the most probative explanation for the "mistake". As it makes clear, Ms. Krupski sought recovery from the operator of the Costa Magica for breach of the legal duties imposed on one in that position. The "mistake", quite evidently, was identifying Costa Cruise, rather than Costa Crociere, as the operator having that status and attendant duties. This mistake, "mistaken identity" in the terminology of "Previously Unnamed Defendants", constitutes a "mistake regarding the identity of the proper party" under any reasonable construction of that phrase. See ***Mitchell v. CFC Fin. LLC, supra*, 230 F.R.D at 550** ("most courts allow relation back" in "mistaken identity" cases where "the plaintiff seeks to amend to substitute a new defendant

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[14] In its Response to the Petition for Writ of Certiorari, Respondent contended that the explanation by Ms. Krupski's counsel should be ignored because it is unsworn (Brief in Opposition, pp. 15-16). Ironically, Respondent has relied on the same explanation to support its thesis that Petitioner sued Costa Cruise as a matter of convenience. If the outcome depended on the truthfulness of the explanation by Petitioner's counsel, the trial court should have denied summary judgment pending resolution of that controlling issue of fact.

to correct its failure to name the legally responsible entity").

The basic factual paradigm is a familiar one. In virtually every other case of this nature, the courts have allowed relation back, finding the "mistake" to be one falling within the Rule. That result is particularly compelling where the initial suit was against an affiliate of the added defendant with a similar name. See, *e.g.* ***Montalvo v. Tower Life Bldg.*, 426 F.2d 1135 (5th Cir. 1970)** (the initial suit against "Tower Life Building" permits relation back of an amendment adding Tower Life Insurance Company, the owner of the building); ***Roberts v. Michaels, supra*** (employment suit against Midsouth Food Vending Services, Inc. relates back to the initial complaint naming Michaels d/b/a Mid-South Vending); ***Leonard v. Parry, supra*** (suit against Boulanger as driver of the vehicle that collided with plaintiff's car amended to add Parry, the actual driver); ***Goodman, supra*** (in a contract suit against the successor to Tracer Research Corp., substitution of Prax Air Services, Inc., the actual successor, relates back to the initial suit against Prax Air, Inc., its parent); ***Loveall, supra*** (product liability suit against the actual manufacturer relates back to the initial suit against another company sued as manufacturer); ***Dutka, supra*** (relation back allowed where the plaintiff, injured in an automobile-train collision, sued one railway company which did not own the train or supply the crew, then added its related company that did operate the train); ***Chumney, supra*** (mistake as to the name of the manufacturer); ***Tenay, supra*** (in a slip and fall case, suit against the Culinary Institute of America, which maintained the premises, relates back to the earlier suit against the Culinary Teachers Association,

the union of those working there); ***William H. McGee & Co. v. M/V Ming Plenty*, 164 F.R.D. 601 (S.D.N.Y. 1996)** (suit against Kenney Korea, which issued the bill of lading, relates back to the initial suit against Kenney USA, a related company also mentioned in the bill of lading).

Modern enterprises are often conducted by a number of related corporations, often sharing very similar names, working together as part of a consolidated business activity. Whether to confuse creditors, limit liability, or for other reasons, the decision to conduct business in this fashion leads to the likelihood of error by a claimant in identifying the correct defendant from among several sound-alike companies. The situation is rife with the risk of misidentification. It is also a prime reason for the liberality of amendment under Rule 15, lest businesses avoid liability through a corporate name game.

The likelihood of confusion is particularly great in the maritime industry where pleasure cruise and other enterprises do business under a multitude of names, leading to uncertainty by claimants. Examples of this phenomenon can be seen in cases like ***Fugaro v. Royal Carribean Cruises*, 851 F. Supp. 122 (S.D.N.Y. 1994)**; ***Schrader v. Royal Carribean Cruise Line, Inc.*, 952 F.2d 1008 (8th Cir. 1991)**; ***Axelrod v. Incres S.S. Co.*, 363 F.2d 531 (2nd Cir. 1966)** and ***Tenay***.

The application of Rule 15 "relation back" to vessel operators is illustrated by ***Suppa v. Costa Crociere S.p.A.*, No. 07-60526-CIV, 2007 WL 4287508; 2007 U.S. Dist. LEXIS 89165 (S.D. Fla. Dec. 4, 2007)** (DE 47, Response to Motion to Dismiss, Ex. 6) (where, as

here, the original suit was against Costa Cruise and the amended suit against Costa Crociere); ***Korn v. Royal Carribean Cruise Line, Inc.*, 724 F.2d 1397 (9th Cir. 1984)**; and ***G.F. Co. v. Ocean Shipping Co., supra*** (a suit initially brought against the agent for a shipping company and amended to add the shipping company itself).

Petitioner is not the only person mistaken as to the identity of the company operating a vessel. She should not be the only one denied the benefit of relation back.

As this body of case law demonstrates, where the plaintiff seeks recovery from the defendant whose status gives rise to actionable duties, a mistake regarding the identity of the company occupying that status is a "mistake concerning the proper party's identity." An amendment bringing in the actual company fitting the description set out in the initial Complaint relates back, so long as the "notice" and "prejudice" criteria of Rule 15(c)(1)(C) are met.

(3) The Errors In The Analysis Of The Circuit Court And District Court

In general, the approach of the District Court and Circuit Court departs from the mainstream of Rule 15 jurisprudence and the analysis offered in this Brief. In particular, there are several discrete flaws in their decisions.

(a) The District Court View That Both "Ignorance" And "Knowledge" Foreclose Relation Back Is Erroneous

The District Court began by noting that pre-suit **ignorance** of the identity of the proper defendant does not constitute a "mistake" (which, in her view, required "misnomer" or "misidentification") (18a, " 'mistake' . . . should not be construed to mean 'lack of knowledge'; " 'Ignorance does not equate to misnomer or misidentification' "). She then opined that "mistake" did not apply if "the newly added defendant was **known** to the plaintiff before the running of the statute of limitations" (19a). Taking these pronouncements together, there can be no "mistake" when there is either "ignorance" or "knowledge"; *i.e.* there could **never** be relation back. That untenable thesis - - "heads I win, tails you lose" so to speak - - is belied by the very nature and existence of the Rule and the numerous cases applying it to permit relation back.

(b) The District Court Erred In Assessing Petitioner's Pre-suit "Knowledge" On The Basis Of Information Provided After Suit Was Filed And The Limitation Period Had Expired

The District Court considered the information received by Krupski with the Costa Cruise Answer and later filings as evidence of Petitioner's pre-suit "knowledge" evidencing lack of "mistake" (19a - 20a):

> ". . . Krupski's First Amended Complaint cannot relate back under Rule 15(c)(1)(C)(ii) because her failure to timely name Costa Crociere S.p.A. as a defendant was not the result of a mistake. [Costa Cruise] informed Krupski that Costa Crociere S.p.A. was a proper party to the action as early as February 25, 2008. (*See Answer* [D.E. 6] at ¶ 11).
>
> On March 20, 2008, [Costa Cruise] listed Costa Crociere S.p.A. as an Interested Party in its Corporate Disclosure Statement [D.E. 13]. And in its Motion for Summary Judgment [D.E. 19], [Costa Cruise] once again, confirmed: "Costa Crociere S.p.A. is the 'Carrier' for purposes of this cause of action asserted by plaintiff. Defendant Costa Cruise Line L.V. L.L.C. does not occupy the legal status of the 'Carrier.'"

The Costa Cruise Answer and later documents were filed more than one year after the date of injury. By that time, as long as other time requirements were met - - and here they were - - it made no difference whether leave to amend was sought immediately or in response to a later motion for summary judgment. In either event, the maintainability of suit against Costa Crociere would rise or fall on the events which had already transpired. If relation back applied, a later suit against Costa Crociere could be pursued; if not, it was already time-barred.

The lapse in logic by the lower court was addressed in ***Leonard*, 219 F.3d at 29**:

". . . [K]nowledge acquired by a plaintiff after filing his original complaint is without weight in determining his state of mind at the time he filed the initial complaint and, thus, in determining whether a mistake concerning identity occurred."

(c) The Lower Courts Erred In Considering The Delay In Seeking Leave To Amend As An Independent Basis For Denying Relation Back Under Fed. R. Civ. P. 15(c)(1)(C)

In denying relief, the District Court explained as one reason (20a):

"Krupski . . . did not seek to add Costa Crociere S.p.A. as a defendant until June 13, 2008, 133 days after the Original Complaint was filed [D.E. 26]. The court granted leave to amend the Complaint on July 2, 2008 [D.E. 30], and Costa Crociere S.p.A. was named as a defendant on July 11, 2008 [D.E. 31], 161 days after the Original Complaint was filed."

The Circuit Court also intimated that this was a permissible basis for denying Rule 15 relation back (7a):

"Yet even assuming that she first learned of Costa Crociere's identity as the correct party from Costa Cruise's Answer (filed on February 25, 2008), Krupski failed to seek leave to amend her complaint until June 13, 2008 (133 days after she brought the original action) and did

> not file her Amended Complaint until July 11, 2008. Krupski offers no reason for this delay, and we expect she knew that the limitation period ran on February 21, 2008."

As an initial point, the Complaint and Amended Complaint were both indisputably filed and served within the necessary time limits. The Complaint was filed less than one year after the injury, complying with both the three year statutory limitation period of 46 U.S.C. § 30106 and the one year contractual limitation period. It was served within the 120 day period of Fed. R. Civ. P. 4(m). As a result, Costa Cruise (and, by extension, Costa Crociere) received timely notice that Ms. Krupski sought legal redress from the operator of the Costa Magica for her injury, about which her counsel had provided timely pre-suit notice.

Under Fed. R. Civ. P. 15(a)(2), by the time the Costa Cruise Answer was filed, an amended complaint could only be filed with the consent of the opposing party or by leave of the court. Once leave was obtained (DE 30; JA 71 - JA 72), the Amended Complaint was filed nine days later (DE 31; JA 73 - JA 84). It was served on Costa Crociere pursuant to the Hague Convention on August 21, 2008, well within the deadline established by the District Court's Order (DE 30; JA 71 - JA72).

Accordingly, Petitioner complied with all filing deadlines, including those of Fed. R. Civ. P. 15(c)(1)(C), providing Costa Cruise and Costa Crociere timely notice. The lower courts' view - - that relation back must nonetheless be withheld for delay in filing the motion to amend - - suggests that compliance with

legal deadlines is not enough; that a filing must be "early" in a permitted period rather than "late". That view is both perplexing and erroneous.

To be sure, "undue delay" in seeking leave to amend may be a basis for denying **a motion for leave to amend**. ***Foman v. Davis*, 371 U.S. 178, 182 (1962).** Here, the court **granted** leave to amend, despite the delay. Once leave was granted, the issue of relation back surfaced. On **that** issue, the controlling criteria are those of Rule 15(c)(1)(C), which does not include "delay in filing a motion to amend". To this extent, the decisions below are inconsistent with Rule 15(c)(1)(C) and ***Schiavone*** by creating a judge-made hurdle not found in the Rule or the decision of this Court.

Perhaps the lower courts had in mind the principle that a **deliberate choice** not to sue is not a "mistake" [see subsection (d) *infra*]. Under that premise, the failure to add the new defendant **within the initial limitation period**, despite knowledge of its identity and role **during the limitation period**, is **circumstantial evidence** that the failure to sue within the limitation period was a conscious choice rather than a "mistake". ***Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998); *Kilkenny v. Arco Marine, Inc.*, 800 F.2d 853, 856-857 (9th Cir. 1986); *Keller v. United States*, 667 F. Supp. 1351, 1357 (S.D. Cal. 1987).**

Other than the "imputed" "knowledge" found in the ticket, the information provided by Costa Crociere in litigation was filed after the limitation period had expired. These later filings, and the delay in seeking leave to amend afterward, do not change the analysis.

Petitioner's claimed delay in filing a motion to amend after the identification of Costa Crociere in the Costa Cruise Answer is of no legal significance. The outcome rises or falls on the "mistake" criterion of Rule 15(C)(1)(C)(ii) and the Respondent's contention that pre-suit "imputed" "knowledge" itself refutes the existence of a "mistake" within the meaning of the Rule.

(d) The Circuit Court Erred In Concluding That "Imputed" "Knowledge" Of The Existence Of The Added Defendant Before Commencement Of The Initial Suit Equates To Lack Of "Mistake Concerning The Proper Party's Identity"

The most tenable justification for the decisions below rests on the body of law holding that a deliberate choice to exclude a known responsible party is not a "mistake". There are considerable questions about the correctness of this proposition. The proper focus under subsection (ii) ("knew or should have known") is on the knowledge of the added defendant, not the plaintiff. See ***Holden v. R.J. Reynolds Indus., Inc.*, 82 F.R.D. 157, 160 (M.D.N.C. 1979).** Furthermore, a conscious decision of this type is "concerning the proper party's identity", and if it is a mistake - - whether a mistake of judgment, mistake of law, or tactical mistake - - it is nonetheless a "mistake" and covered by the plain language of the Rule.

For present purposes, one can accept the proposition that it is not a "mistake" if the plaintiff has actual knowledge from the outset of the actual "proper party" against which to assert the intended claim, but

makes a "deliberate choice" to sue someone else. There is, however, absolutely no evidence in the record to support the conclusion that Petitioner intentionally forewent suit against Costa Crociere with actual knowledge that Respondent, not Costa Cruise, was the vessel operator.

The lower courts apparently concluded that, if counsel had read the ticket carefully, he would have seen, with sufficiently acute vision, that one page mentioned "Costa Crociere" in the definition of "carrier".[15] It was this "imputed" "knowledge", in the

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[15] Believing that the Rule does not consider degrees of blameworthiness for a "mistake", Petitioner will not belabor the reasons why her counsel's oversight was understandable. The documentation identifying "Costa Cruise" more prominently than "Costa Crociere", the correspondence with the claims adjustor, and Respondent's failure to register with the Department of State of Florida, in whose waters the voyage began, are self-explanatory.

Nonetheless, it bears mention that while Costa Crociere is the principal entity mentioned in the definition of "CARRIER", nothing in that definition says, in so many words, that the name of the "CARRIER" is necessarily the name of the entity operating the vessel and responsible for injuries aboard the ship. Indeed, the "CARRIER" definition also includes the galley cook, captain, entertainers, and doctor, as well as the manufacturer of every part on the vessel. All of these are as much "CARRIER" as Costa Crociere definitionally, but are not the vessel operator and are not subject to the legal duties imposed on a shipowner.

Petitioner acknowledges that if her counsel had read the ticket carefully, he might reasonably have inferred that "Costa Crociere" was the name of the operator. However, the language of the "CARRIER" definition is not unequivocal notice of the identity of the shipowner as Respondent and the lower courts suggest.

words of the Court of Appeals (6a), which led to the conclusion that the omission of Respondent was a deliberate choice rather than a mistake.

One shortcoming in this leap of logic is that it treats **constructive notice** ("imputed" "knowledge") as tantamount to **actual knowledge**. The principle favorable to Respondent addresses a conscious decision to forego suit against a known defendant. "Knowledge", to the extent relevant to the inquiry, is considerably more nuanced than the facile assumption that constructive notice or "imputed knowledge" automatically equates to a conscious decision to forego suit against a known wrongdoer.

The conclusion reached below clashes with cases which, at least by implication, reject the view that it cannot be a "mistake" when the plaintiff has pre-suit information or knowledge which could, or should, have led counsel to sue the proper party. See *e.g.* ***Tenay*** (relation back, even though the plaintiff had identified and written to the proper party before filing suit); ***William H. McGee & Co., supra*** (where the name of the correct party was on the bill of lading); ***DeCoelho* at 637** (although, ". . . plaintiffs were inattentive to the transcript of the investigation . . . where the correct name of [the] employer could have been found, we find this insufficient to deny them leave to include the proper defendant"); ***Centuori*, 329 F. Supp. 2d at 1139-1140** ("At best, these documents demonstrate that Centuori and/or his counsel might have been negligent, careless, or even arguably at fault for not naming MIS as the responsible credit reporting agency in the original Complaint; however, they do not show that the failure to name MIS was a strategic decision and not the result of a mistake concerning identity").

In ***Williams v. Doyle*, 494 F. Supp. 2d 1019, 1030 (W.D. Wisc. 2007)**, the Court pointedly explained why previous awareness of a party does not constitute a "deliberate choice" rather than a "mistake":

> "In my view, the best interpretation of this statement is that a party may not use *Rule 15(c)(3)* if it makes a strategic decision, or 'chooses', not to sue a particular party. It cannot mean simply that a plaintiff is prohibited from adding a party if it was previously aware of that party. This would make the rule a virtual nullity in this circuit, because the court of appeals has held that parties may not use *Rule 15(c)(3)* to amend their complaints to replace a 'John Doe' defendant after they learn the identity of that party. *Hall v. Norfolk Southern Railway Co., 469 F.3d 590, 596 (7th Cir. 2006)* Thus, under plaintiff's [*sic*] interpretation, *Rule 15(c)(3)* would be read out of existence because it could not be used to add known parties or unknown ones. Further, if the new party's identity had been a complete mystery before the amendment, it would be unlikely that the plaintiff would be able to satisfy the other requirements of *Rule 15(c)(3)*, which are that the new party had notice of the claim previously and would not be unfairly prejudiced by the amendment."

In virtually every case, the plaintiff's counsel, with sufficient diligence, could have learned the true identity of the intended defendant. If "imputed" "knowledge" (another way of saying counsel knew or should have known of the true identity in time to avoid

the mistake) was fatal, Rule 15(c) relation back would be virtually impossible.

The reasoning of the lower courts essentially criticizes Petitioner's counsel for overlooking the information available in the ticket. If the criticism is well founded, it means that he made a mistake. An oversight or mistake of this nature is precisely what Rule 15(c)(1)(C)(ii) addresses. The Court should reject an analysis which, reduced to its essence, holds that those who make a "mistake" are disqualified from relief under a Rule which provides relation back for a "mistake concerning the proper party's identity".

Apart from this dubious leap of logic, Respondent offered no evidence, or even plausible reason to believe, that Petitioner's counsel, with actual knowledge that Costa Crociere was the responsible vessel operator, nonetheless made a deliberate choice to sue Costa Cruise, intentionally mis-describing it as the vessel operator. While other defendants have tried to thwart relation back by invoking the "deliberate choice" doctrine, courts have rejected the claim where it is lacking in evidentiary support, counter-intuitive, and contrary to the Complaint. See *e.g.* ***Loveall*, 196 F.R.D. at 403-404** and ***Goodman*, 494 F.3d at 469.** In ***Leonard*, 219 F.3d at 28, fn. 2,** the Court observed:

> "The district court suggested that Leonard may have intentionally opted to sue Boulanger on a theory of negligent entrustment (or so Parry could have thought) . . . This speculation is conclusively refuted by the fact that both the original and amended complaints were predicated exclusively on allegations of the

driver's negligence in the operation of the motor vehicle."

In support of its argument that Petitioner made a deliberate choice to sue the wrong Defendant, Respondent has suggested, based on Petitioner's counsel's review of the Florida Department of State website, that Petitioner sued Costa Cruise because it was a convenient defendant. The same argument was made and rejected in ***Morel v. Daimler-Chrysler AG*, 565 F.3d 20 (1st Cir. 2009).** ***Morel*** was a product liability suit in which the plaintiff sued the wrong Daimler-Chrysler corporation. In ***Morel***, the First Circuit Court of Appeals said **(565 F.3d at 27)**:

> "It is obvious from the face of the original complaint that the plaintiffs intended to sue the manufacturer of the allegedly defective automobile. For aught that appears, they made a mistake concerning the manufacturer's identity.
>
> * * *
>
> DCAG attempts to parry this thrust by suggesting that the plaintiffs might intentionally have 'sued "Daimler-Chrysler" by an ambiguous name and served the complaint in Michigan in the hopes that [DCAG] would respond and thereby obviate the need for the costly and often time-consuming requirements of Hague Convention service.' Appellee's Br. at 32. We find this suggestion fanciful.
>
> The summary judgment record contains nothing that would support this suggestion . . . What we do find - - for example, the assertion by plaintiffs' counsel that 'Daimler-Chrysler'

was named because the corporate website did not distinguish between DCC and DCAG - - points in the opposite direction.

Litigation should not be reduced to a game of cat and mouse. In this last analysis, it seems highly improbable that, with the limitations period about to expire, the plaintiffs, represented by seasoned counsel, would have made such a risky strategic choice.

On this record, the only reasonable inference is that a mistake was made.

* * *

This inference is reinforced by the fact that, once the plaintiffs learned of their error, they had no difficulty in serving DCAG under the Hague Convention."

CONCLUSION

This Court should reverse the decisions of the Court of Appeals for the Eleventh Circuit and the District Court because those Courts erred in the interpretation and application of Fed. R. Civ. P. 15(c)(1)(C). The Court should clarify the meaning of the Rule and hold that, in this case, the Amended Complaint against Costa Crociere relates back to the timely initial Complaint against Costa Cruise, therefore Respondent is not entitled to summary judgment on statute of limitation grounds.

The case should be remanded to the District Court for further proceedings.

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Dated: February 24, 2010

RESPONDENT'S BRIEF

No. 09-337

IN THE

Supreme Court of the United States

WANDA KRUPSKI,

Petitioner,

v.

COSTA CROCIERE S.p.A., a foreign corporation (Italy),

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Wanda Krupski, injured on a cruise ship, timely sued the sales and marketing company which sold her the ticket, but only after the limitations period expired did she sue Costa Crociere, the operator of the vessel on which she had travelled. Under Rule of Civil Procedure 15(c), a plaintiff's failure to sue a proper defendant within the limitations period may be excused "if within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

Did Krupski make a mistake, and did Costa Crociere know or have reason to know that it would have been sued but for the mistake, where within the period provided by Rule 4(m) Krupski had the ticket revealing the proper defendant, Krupski's attorney read the ticket, Krupski had been told that the sales and marketing company could not be held liable under general maritime law, and Krupski had been told that Costa Crociere was the proper defendant?

PARTIES TO THE PROCEEDING

Respondent relies on the list of parties and corporate disclosure statement on page ii of its Brief in Opposition to the Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

Plaintiff Wanda Krupski purchased a ticket for a cruise on board the *Costa Magica*. JA 36. The cruise began in Fort Lauderdale, Florida, on February 18, 2007, and Krupski claims that on February 21, 2007, she was injured on the ship when she fell in the theater. JA 23, 35, 76.

Weeks before the cruise, Krupski received her passenger ticket contract. JA 36. The contract (which appears at JA 40 and at Pet. App. 27a-37a) urged Krupski to review its terms. The ticket's cover stated "IMPORTANT NOTICE! PLEASE READ THIS TICKET IN FULL UPON RECEIPT AS IT LIMITS YOUR LEGAL RIGHTS." JA 40, 36. The passenger was urged to "carefully examine the ticket, especially the section noted as 'GENERAL CONDITIONS OF PASSAGE TICKET CONTRACT.'" JA 40, 37.

The ticket contained provisions indicating that lawsuits concerning the cruise were to be brought against the "carrier." The first page of the "general conditions" stated that the "CARRIER" "undertakes to transport the Passenger." Pet. App. 27a. The ticket provided that "[t]he CARRIER shall be liable only for its negligence," and the "CARRIER" disclaimed liability for certain damages for emotional distress. Pet. App. 28a, 36a.

The ticket also stated that the "carrier" could not be liable for personal injury unless given written notice of a claim within 185 days after the date of the injury. Pet. App. 27a-28a. Attempting to comply with this

provision, Krupski (through counsel) gave written notice of her claim on July 2, 2007. JA 69-70. The notice was sent to "Costa Cruiselines, N.V.," in Hollywood, Florida. JA 69. Krupski received a response from "International Risk Services, Inc., as Claims Administrator for Costa Cruise Lines N.V." Pet. App. 24a.

The ticket also provided that any claim against the "carrier" had to be filed within one year. Pet. App. 28a. Seeking to comply with this provision, Krupski filed her lawsuit just before the end of the limitations period. The limitations period expired on Feb. 20, 2008, and she filed her lawsuit on February 1, 2008. JA 21-28.

The ticket also had a provision requiring that any lawsuit against the "carrier" be filed in United States District Court for the Southern District of Florida. Pet. App. 36a. Although Krupski lived in Michigan, she sought to comply with this provision too. JA 21.

The ticket thus had three specific provisions which governed Krupski's claim against the "carrier"—notice of claim, venue, and time for suit. Krupski sought to comply with all three of these provisions. Indeed, Krupski acknowledged in her complaint that she (or her lawyer) had read the ticket. Her complaint noted that "the passenger ticket contains a forum selection clause," and that "all pre-suit requirements of the passenger ticket contract" were satisfied. JA 23. Krupski admitted that her attorney reviewed the ticket. JA 43.

The ticket contained a definition of "carrier" so that a claimant could determine which claims were subject to the three provisions governing notice of claim, venue,

and time-for-suit, as well as the limitations of liability. The ticket made clear that the "carrier" was an Italian corporation named Costa Crociere S.p.A.:

> *The word 'CARRIER' when used in this Contract, shall mean Costa Crociere S.p.A., an Italian corporation*, and all Vessels and other ships owned, chartered, operated, marketed or provided by Costa Crociere S.p.A., and all officers, staff members, crew members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns on board said Vessels, and the manufacturers of said Vessels and all their component parts.

Pet. App. 27a (emphasis added). The ticket mentioned another corporation, Costa Cruise Lines N.V., and explained that it was merely the "sales and marketing agent for the CARRIER and the issuer of this Passage Ticket Contract." Pet. App. 29a.

Despite the contractual provisions identifying Costa Crociere as the carrier against whom suit should be brought, Krupski did not file her suit against Costa Crociere. Instead, on the eve of the running of the limitations period she named as defendant an entity which she called "Costa Cruise Lines, N.V., L.L.C., d/b/a Costa Cruise Lines, a foreign corporation (Netherlands Antilles)." JA 21.

Krupski served her complaint on Costa Cruise Lines N.V., L.L.C. on February 4, 2008. JA 21, DE 3. Costa Cruise Lines, in its answer filed on February 25, 2008,

stated that it was not involved in the operation, ownership or management of the vessel. JA 29-30. It referred to the ticket, and noted that under the ticket "the undertaking to transport Plaintiff aboard the *Costa Magica* as carrier was by Costa Crociere S.p.A, an Italian corporation." JA 31. It repeated the contractual provision that Costa Cruise Lines was merely the sales and marketing agent, and stated that it could not be held liable to Krupski under general maritime law. JA 31. Despite being informed that Costa Crociere was the proper defendant under the contract and general maritime law, Krupski did nothing to prosecute a claim against Costa Crociere.

Three months later, on May 6, 2008, Costa Cruise Lines moved for summary judgment. DE 19. Costa Cruise Lines again made it clear that the proper claim was against Costa Crociere. "[T]he asserted negligence based cause of action can be maintained by plaintiff only against the 'Carrier.' In this instance it is undisputedly Costa Crociere S.p.A." DE 19 - Pg 8. *See also* DE 19 - Pg 7-8, 10. Costa Cruise Lines submitted an affidavit in support of the motion for summary judgment, and that affidavit repeated that the *Costa Magica* was owned and operated by Costa Crociere. JA 35.

Over a period of many months, Krupski was thus repeatedly informed that Costa Crociere was a proper defendant. But Krupski did nothing. Finally, on June 13, 2008—fourteen days after the expiration of "the period provided by Rule 4(m) for serving the summons and complaint," Rule 15(c)(1)(C)—Krupski acted in contradiction to her previous clear lack of interest in prosecuting a claim against Costa Crociere. Krupski then

moved to amend her complaint to add Costa Crociere as a defendant. JA 41-55. In her motion, Krupski with understatement said that "it has been brought to Plaintiff's attention that Costa Crociere, S.p.A. is a proper defendant to this lawsuit." JA 45. She acknowledged that while leave to amend is to be freely given when justice so requires, whether a new claim relates back is a separate issue. JA 52 n.1.

Krupski did not, at this time or at any other time, present any testimony about why she had not sued Costa Crociere earlier. However, in her response to Costa Cruise Lines' motion for summary judgment, Krupski's counsel described what he called his "pre-litigation due diligence." JA 43. Although the passenger ticket in his possession plainly indicated the proper defendant, Krupski's counsel explained that he performed "internet research regarding Costa Cruise Lines." JA 43. That search, at the www.costacruise.com web site, indicated that the only United States office listed was "Costa Cruise Lines, N.V." in Hollywood, Florida. JA 43-44. Krupski's lawyer said that he next went to the website of the Florida Department of State Division of Corporations, where he searched for "Costa Cruise Lines." JA 44-45. The result of the search was "Costa Cruise Lines N.V. L.L.C." *Id.*[1] He therefore

1. Krupski, implying that Costa Crociere was required to register with the State of Florida, refers to "Respondent's failure to register with the Department of State of Florida, in whose waters the voyage began." Petitioner's Brief, at 46 n.15.

Krupski's implication is incorrect. Florida law provides that where a corporation's only business in Florida is interstate, the corporation need not register with the state. Fla. Stat.

(Cont'd)

sued Costa Cruise Lines N.V. *Id.* Krupski attached photocopies of the web sites. JA 56-68.

The district court heard argument on Costa Cruise Lines's motion for summary judgment. JA 124-45. During the argument Krupski's counsel admitted that "under the plain language of the ticket, Costa Cruise Lines clearly can't be a carrier." JA 139. The district court allowed Krupski to file an amended complaint adding Costa Crociere as a party, with the relation-back issue to be resolved later. JA 143, 71-72. The court denied Costa Cruise Lines' motion for summary judgment without prejudice, noting that the issue could be raised again once it was determined whether the sales and marketing company had any employees on the *Costa Magica*. JA 139-43 71-72.

On July 11, 2008, Krupski filed an amended complaint which restated her claim against Costa Cruise Lines, and for the first time asserted a claim against Costa Crociere. Krupski's legal theories against the two defendants varied. She alleged (as she had in the first complaint) that Costa Cruise Lines owed a duty to her because it "owned, operated, managed, supervised and controlled" the *Costa Magica*. JA 76, 23. On the other hand, Krupski alleged that Costa Crociere owed a duty to her "as CARRIER under the terms of the passenger ticket contract." JA 80.

(Cont'd)

§ 607.1501(2)(i); *Circular Advertising v. American Mercantile Co.*, 63 So. 3 (Fla. 1913); *Norman M. Morris Corp. v. Weinstein*, 466 F.2d 137, 142 (5th Cir. 1972). In contrast, Federal law imposes certain requirements on vessels which board passengers in the United States. 46 U.S.C. § 44101-44103. Costa Crociere complies with these federal requirements.

About a month later, using the Hague Convention, Krupski served the amended complaint on Costa Crociere in Genoa, Italy. DE 46. Krupski also agreed to voluntarily dismiss Costa Cruise Lines from the lawsuit. JA 85-86.

Krupski and Costa Crociere then focused on the issue on appeal: whether Krupski's failure to sue Costa Crociere within the limitations period could be excused by Rule 15(c). JA 87-123. The district court entered summary judgment in favor of Costa Crociere, based upon a finding that Krupski had not established that "within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Rule of Civil Procedure 15(c)(1)(C)(ii); Pet. App. 8a-22a. The Eleventh Circuit unanimously affirmed. Pet. App. 1a-7a.

SUMMARY OF ARGUMENT

Krupski failed to establish that her untimely complaint against Costa Crociere relates back.

Krupski did not make a "mistake concerning the proper party's identity" under Rule 15(c), and Costa Crociere neither knew or should have known that the action would have been brought against it, but for a mistake. Krupski made a conscious choice to not sue Costa Crociere. She possessed and read the ticket which revealed that Costa Crociere was the proper defendant. Later, when Costa Cruise Lines filed its answer, she was told that Costa Crociere was the proper defendant, and then told again when Costa Cruise Lines filed its motion

for summary judgment. Krupski's failure to sue Costa Crociere may have been foolish, but it was not a mistake.

Krupski's argument that events after the end of the limitations period are irrelevant ignores the plain language of Rule 15(c), which states that the time of inquiry is "within the period provided by Rule 4(m) for serving the summons and complaint." The rule, as amended in 1991, gives extra protection to a plaintiff. A plaintiff told in an answer that the wrong defendant has been sued will almost always have the opportunity to sue the proper defendant. Such a suit, within the Rule 4(m) period, will establish that there was a mistake under Rule 15(c). But even this liberal rule does not help Krupski, since she was repeatedly told that Costa Crociere was the proper defendant, but nevertheless did nothing during the Rule 4(m) period.

The dismissal of Krupski's untimely claim against Costa Crociere is not harsh, but simply the proper legal result. The law requires dismissal, and pleas for liberality do not trump the law. If there is any harshness, it is because of Krupski's failure to protect her own interests.

Krupski's argument that the mistake provision of Rule 15(c) should have no meaning beyond the notice and prejudice provisions would render the mistake provision meaningless. While one case supports Krupski's argument, the case is based on a misreading of Rule 15(c), and would leave the courts defenseless against a flood of "John Doe" claims.

The district court's conclusion that Krupski did not make a "mistake" was not an abuse of discretion or clearly erroneous.

ARGUMENT

KRUPSKI'S DELIBERATE DECISION TO NOT SUE COSTA CROCIERE WAS NOT A "MISTAKE" EXCUSED BY RULE OF CIVIL PROCEDURE 15(c)

Krupski is not entitled to have her complaint relate back. The plain language of Rule of Civil Procedure 15(c) provides that an untimely claim against a new defendant will relate back to the original complaint "if within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." Here, during the relevant time Krupski had abundant knowledge that Costa Crociere was a proper defendant—this was stated in her ticket, which her attorney read (and otherwise complied with); this was stated in Costa Cruise Line's answer; and this was stated in Costa Cruise Line's motion for summary judgment. A plaintiff's failure to sue a clearly identified, known defendant is not a mistake, but rather is a deliberate decision not within the scope of Rule 15(c). Similarly, in light of Krupski's deliberate decision, Costa Crociere had no reason to believe that it would have been sued but for a mistake.

Krupski, throwing herself on the mercy of the Court, asks that her deliberate decision be deemed a mistake.

and the provisions of Rule 15(c) be read liberally to the point that they ignore the language of the rule. But this Court has stated that it will "accept the Rule as meaning what it says." *Schiavone v. Fortune*, 477 U.S. 21, 30 (1986). Requirements for gaining access to the courts cannot be cast aside out of vague sympathy for a particular litigant. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). Experience teaches that strict adherence to requirements specified by Congress is the best guarantee of evenhanded administration of the law. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

A. Rule 15(c) excuses a plaintiff's untimely claim only if the plaintiff proves both that there was a "mistake" and that the defendant knew or should have known that it would have been sued but for the mistake

Rule 15(c) provides the exclusive means by which an amendment which adds a new party may relate-back to an earlier complaint. *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F3d 1498, 1501 (9th Cir. 1994). The provision on adding new parties was included in the Rule in 1966. The "mistake" language was adopted almost verbatim from an article by Professor Clark Byse. *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 10, 56 n.12 (1963). As discussed below, the provision was amended in 1991, mostly in response to this Court's decision in *Schiavone v. Fortune*, 477 U.S. 21 (1986). Amendments in 2007 were stylistic only.

Courts interpreting the rule have held that the "mistake" provision requires that the plaintiff establish both that he or she made a "mistake," and that the newly-added defendant knew or should have known that it would have been sued, but for the "mistake."[2]

Once the defendant has established that the plaintiff did not sue that defendant within the limitations period, the burden of proof rests on the plaintiff to show that the new claim relates back under Rule 15(c).[3] The plaintiff must satisfy each of the requirements of the rule. *Schiavone v. Fortune*, 477 U.S. at 29.

B. The evidence established that Krupski made a deliberate decision to not sue Costa Crociere

Krupski is not entitled to the benefits of the relation-back provision of Rule 15(c) because she made a deliberate, conscious decision to not sue Costa Crociere. Such decisions are not within the scope of Rule 15(c).

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2. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 467 n.1 (2000); *Morel v. DaimlerChrysler AG*, 565 F.3d 20, 26-27 (1st Cir. 2009); *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir. 1994); *King v. One Unknown Federal Correctional Officer*, 201 F.3d 910, 914 (7th Cir. 2000); *Shea v. Esensten*, 208 F.3d 712, 720 (8th Cir. 2000); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993); *Powers v. Graff*, 148 F.3d 1223, 1226-27 (11th Cir. 1998); *Rendall-Speranza v. Nassim*, 107 F.3d 913, 918-19 (D.C. Cir. 1997). *See* 3 MOORE'S FEDERAL PRACTICE § 15.19[3][c], at 15-109 (3d ed. 2009).

3. *Soto v. Brooklyn Correctional Facility*, 80 F.3d 34, 35 (2d Cir. 1996); *Smith v. Chrysler Corp.*, 45 Fed. App'x 326, *1 (5th Cir. 2002); *Dodson v. Hillcrest Securities*, 95 F.3d 52, *10 (5th Cir. 1996) (unpublished, available on Westlaw); *Farrell v. McDonough*, 966 F.2d 279, 282-83 (7th Cir. 1992).

This Court has noted that Rule 15(c) "applies only in cases involving 'a mistake concerning the identity of the proper party.'" *Nelson v. Adams USA*, 529 U.S. 460, 467 n.1 (2000). The rule thus did not apply where the plaintiff "made no such mistake. It knew of [the new defendant's] role and existence and, until it moved to amend its pleading, chose to assert its claim for costs and fees only against OCP." *Id.*

The Second Circuit recently held that "'[a] plaintiff is not considered to have made . . . a "mistake" . . . if the plaintiff knew that he was required to name an individual as a defendant but did not do so.'" *Ish Yerushalayim v. United States Department of Corrections*, 374 F.3d 89 (2d Cir. 2009) (Sotomayor, J.). "[A] conscious choice to sue one party and not another does not constitute a mistake and is not a basis for relation back." 3 MOORE'S FEDERAL PRACTICE § 15.19[3][d], at 15-110 (3d ed. 2009).[1]

In this case, Krupski was fully aware that Costa Crociere was a proper defendant in her suit for injuries aboard the *Costa Magica*.

1. *Accord Barrow v. Westfield Police Department*, 66 F.3d 466, 469 (2d Cir. 1996); *Cornwell v. Robinson*, 23 F.3d 694, 705 (2d Cir. 1994); *Garcia v. City of Philadelphia*, 354 F.3d 215, 221-22 (3d Cir. 2003); *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1183 (3d Cir. 1994); *Lovelace v. O'Hara*, 985 F.2d 847, 850-51 (6th Cir. 1993); *Hall v. Norfolk Southern Railway Co.*, 469 F.3d 590, 596 (7th Cir. 2006); *Saadawi v. American Building Maintenance Industries*, 578 F.3d 787, 792 (8th Cir. 2009); *Shea v. Esensten*, 208 F.3d 712, 720 (8th Cir. 2000); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993); *Killeen v. Acco Marine Inc.*, 800 F.2d 853, 857-58 (9th Cir. 1986); *Powers v. Graff*, 148 F.3d 1223, 1227 (11th Cir. 1998); *Kendall-Spencer v. Nassim*, 107 F.3d 913, 918-19 (D.C. Cir. 1997).

Krupski had a ticket, and that ticket had various provisions which governed claims against the "carrier." Krupski tried to comply with the provisions in the ticket—she gave notice of her claim within 185 days after the date of injury, she filed suit within one year, and she filed her suit in the proper venue. She (or her attorney) clearly read the ticket. Yet she did not honor the provisions of the ticket that identified Costa Crociere as the carrier against whom a claim should be brought. Instead, she sued Costa Cruise Lines, which was clearly identified as the sales and marketing agent for the carrier. Even Krupski's counsel admitted that "under the plain language of the ticket, Costa Cruise Lines, N.V., clearly can't be a carrier." JA 139. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-5 (2010 update) ("The proper defendant in a passenger case is the shipowner or operator, not brokers or agents who issue the ticket or manage the ship for a disclosed principal."). Yet Krupski ignored the provision in the ticket.

Krupski was again told that Costa Crociere was a proper defendant on February 25, 2008, when Costa Cruise Lines filed its answer. The answer informed Krupski that Costa Cruise Lines wasn't involved in the operation, ownership or management of the vessel, and as the sales and marketing agent it could not be held liable under general maritime law. JA 29-31. Costa Cruises Lines explained to Krupski that "the undertaking to transport Plaintiff aboard the *Costa Magica* as carrier was by Costa Crociere S.p.A., an Italian corporation." JA 31. Yet Krupski did not respond by filing a claim against Costa Crociere.

Three months passed. Costa Cruise Lines then filed a motion for summary judgment, which told Krupski that she had to sue the "carrier," and that the carrier was "indisputedly Costa Crociere S.p.A." DE 19 - Pg 8. An accompanying affidavit repeated that the *Costa Magica* was owned and operated by Costa Crociere. JA 35. Again, Krupski did not promptly respond. Only five weeks later, after the time for service under Rule 4(m) had expired, did Krupski first attempt to assert a claim against Costa Crociere.

Krupski's failure to sue Costa Crociere was a deliberate, conscious decision. It may, in retrospect, have been an unwise, even foolish decision. But it was still a deliberate, conscious decision. It was, therefore, not a "mistake." Krupski cannot satisfy either of the two requirements of Rule 15(c)(1)(C)(ii)—within the period provided by Rule 4(m) for service, there was no "mistake" and Costa Crociere did not know or have reason to know that the action would have been brought against it, but for a mistake concerning its identity. Costa Crociere had every right to believe that Krupski's selection of a defendant, made after she conducted the "reasonable inquiry" required by Rule 11(b), was a deliberate decision, rather than a mistake.

The circuits have held that when a plaintiff is told to bring in another defendant, but does not do so during the relevant time, the plaintiff has made a deliberate choice, rather than a "mistake." For example, in *Ish Yerushalayim v. United States Department of Corrections*, 374 F.3d 89, 91-92 (2d Cir. 2009), there was no "mistake" where the district court told the plaintiff within the 120 days allocated for service of process that

the plaintiff had not named the proper party as defendant, but the plaintiff failed to promptly sue the new defendant. The plaintiff could not have the benefit of Rule 15(c). Similarly, in *Sandoval v. American Building Maintenance Industries*, 578 F.3d 787 (8th Cir. 2009), the defendant told the plaintiff that he needed to amend to add a new defendant. The plaintiff waited more than three months, and then sought to rely on Rule 15(c). The court held that inasmuch as the plaintiff was aware of the new defendant's identity for two months before the statute expired, "it cannot be argued that the mistake caused the failure to file a timely complaint." In *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853 (9th Cir. 1986), the plaintiff failed to amend her complaint after being informed of potential defendants. The court concluded that "Rule 15(c) was never intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion to notice of a potential party. . . ." *Id.* at 857-58. Where a plaintiff makes an "intentional choice" to not sue a particular defendant, there is no "mistake." *Lovelace v. O'Hara*, 985 F.2d 847, 850-51 (6th Cir. 1993). "That such a choice may not have been wise and that the attorney later sought to change it, is insufficient to invoke relation back of the amendment under Fed.R.Civ.P. 15(c)." *Id.*

This Court has addressed similar issues in two cases. In rejecting a plaintiff's reliance on Rule 15(c), the Court noted that the plaintiff—suing for defamation based on an article in *Fortune* magazine—could easily have determined the correct defendant merely by looking at the masthead of the magazine. *Schiavone v. Fortune*, 477 U.S. 21 (1986). "This was not a situation where the ascertainment of the defendant's identity was difficult

for the plaintiffs." *Id.* at 28. The Court made the same point in discussing the similar doctrine of equitable tolling. "The simple fact is that Brown was told three times what she must do to preserve her claim, and she did not do it. One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). *Cf. Springman v. AIG Marketing*, 523 F.3d 685, 688 (7th Cir. 2008) ("The purpose of allowing relation back—to extend a deadline—allies the doctrine closely to equitable tolling. . . .").

Krupski did not carry her burden of establishing either of the requirements of Rule 15(c)(1)(C)(ii). She made no mistake. She was told that Costa Crociere was a proper defendant, but did not act upon it. Similarly, since Costa Crociere knew that Krupski had not made a mistake, it did not know or have reason to know that the action would have been brought against it, but for a mistake.

C. Under the plain language of Rule 15(c), the relevant time for analysis is the period stated in Rule 4(m) for service, not the end of the limitations period

Krupski, faced with the trail of her repeated failure to act despite her knowledge that Costa Crociere was the proper defendant, argues that the Court should ignore all the evidence after the end of the one-year limitation period. "Information obtained after the one year period has already expired is irrelevant to the inquiry," she asserts. Pet. Br. 12. *See also* Pet. Br. 41-44.

Krupski's contention is not correct. It is true that in *Schiavone v. Fortune*, 477 U.S. 21 (1986), this Court held that the time for the "mistake" analysis under Rule 15(c)(1)(C) is the expiration of the limitations period. But in response to *Schiavone*, Rule 15 was amended in 1991 to state that an amendment bringing in a new party can relate back "if, *within the period provided by Rule 4(m) for serving the summons and complaint*, the party to be brought in by amendment . . . knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." (emphasis added).

Accordingly, under the plain language of the current rule the time for inquiry is not the end of the limitations period, but the 120 days after the filing of the complaint. "[T]he notice required under the rule is no longer tied to the governing limitations period, but is linked to the federal service of process period of 120 days or any additional time resulting from a court-ordered extension." WRIGHT, MILLER, AND KANE, FEDERAL PRACTICE AND PROCEDURE § 1498 (2009 update). *Accord McGuire v. Turnbo*, 137 F.3d 321, 325 (5th Cir. 1998).

Consistent with the change in the rule, courts have commonly included in their inquiry events after the end of the limitations period and into the time for service under Rule 4(m). For example, in *Ish Yeroshalayim v. United States Department of Corrections*, 374 F.3d 89, 91-92 (2d Cir. 2009), the plaintiff was informed "within the 120 days allocated for service of process that he had not named the proper parties as defendants." Since the plaintiff did not add the defendant within the time remaining in the service period, he could not benefit

from Rule 15(c)(3). Other cases have considered events after the end of the limitations period and during the time for service. *See Morel v. DaimlerChrysler AG*, 565 F.3d 20, 26-27 (1st Cir. 2009); *Garvin v. City of Philadelphia*, 354 F.3d 215 (3d Cir. 2003); *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1182-84 (3d Cir. 1994).[5]

The 1991 amendment to Rule 15(c) was intended to assist plaintiffs, and usually will. A plaintiff who sues the wrong defendant will often learn—upon receipt of an answer or motion to dismiss filed by the wrongly-named defendant—that the proper defendant was not sued. This will commonly be within the time for service under Rule 4(m), and the plaintiff will then be able to move to amend to add the new defendant. Once this is done, it will be indisputable that the original failure to sue the proper defendant had been a "mistake," and the requirements of Rule 15(c) will have been satisfied within the time for service under Rule 4(m).

5. Krupski relies on *Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000), in which the First Circuit stated that "what the plaintiff knew (or thought he knew) at the time of the original pleading is the relevant datum in respect to the question of whether a mistake concerning identity actually took place." This decision is contrary to the plain language of the amended rule, and contrary to the decisions cited above. But even the *Leonard* decision acknowledged that "post-filing events (including inaction in the face of new information)" can be relevant to the extent that they "can shed light upon the plaintiff's state of mind when he filed the original complaint, or do 'inform an added party's reasonable belief concerning the cause of her omission from that complaint.'" *Id.* at 30.

This is precisely what happened in *Suppa v. Costa Crociere S.p.A.*, 2007 WL 4287508 (S.D. Fla. Dec. 2007), which Krupski relies upon. In that case, as in the present case, the plaintiff sued Costa Cruise Lines when she should have sued Costa Crociere. The plaintiff in *Suppa* filed an amended complaint against Costa Crociere within the time for service under Rule 4(m), which made it clear within the relevant time that the prior failure to sue Costa Crociere had been a mistake.

Krupski could have done the same thing. Krupski filed suit against Costa Cruise Lines on February 1, 2008, and the time for service under Rule 4(m) expired on June 2, 2008. JA 21. Accordingly, events until June 2nd are relevant in evaluating whether Krupski satisfied the requirements of Rule 15(c). During this period she could have moved to add Costa Crociere as a defendant. By that time, having read the ticket and been twice told that the lawsuit should be against Costa Crociere, she certainly knew that Costa Crociere was the proper defendant. Her failure to take action during the service period, despite her knowledge, gives rise to the inescapable conclusion that her failure to sue Costa Crociere was a deliberate, conscious decision, rather than a "mistake" under Rule 15(c). Krupski's decision may have been foolish, but it was deliberate, and thus not within the scope of the rule.

D. Krupski's claim that the result is harsh is no reason to ignore the plain language of Rule 15(c)

Krupski's assertions that the decision of the circuit court is harsh and should be rejected in favor of a "liberal" interpretation of Rule 15(c) do not change the conclusion required by the plain language of the rule.

First, while Krupski argues for a liberal interpretation of the Rule in order to excuse her inaction, such liberality has no application here. As the Court stated in *Schiavone*, "We do not have before us a choice between a 'liberal' approach toward Rule 15(c), on the one hand, and a 'technical' interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says." 477 U.S. at 31.

Furthermore, when a plaintiff fails to file suit within the limitations period, and additionally fails to satisfy the requirements for relation-back of the complaint, the dismissal of the lawsuit is not "harsh." It is, rather, the proper ruling in a system governed by laws, rather than by sympathies. *See Schiavone*, 477 U.S. at 31. While there is a desire for a case to be decided on the merits of the claim, there is an important countervailing consideration—the respect to be afforded to a limitation period approved by Congress. 46 U.S.C. § 30508(b).

Additionally, the alleged harshness of the result is due to Krupski's failure to protect her own interests. In the adversarial system of litigation, "the plaintiff is responsible for determining who is liable for her injury and for doing so before the statute of limitation runs out; if she later discovers another possible defendant, she may not, merely by invoking Rule 15(c) avoid the consequences of her earlier oversight." *Rendall-Speranza v. Nassim*, 107 F3d 913, 919 (D.C. Cir. 1997). Krupski got herself into the predicament in which she finds herself.

E. The flaws of Krupski's argument and main authority

Krupski's argument is for a new reading which eviscerates the phrase "mistake concerning the proper party's identity" in Rule 15(c)(1(C)(ii). "[W]here the 'notice' and 'not prejudiced' requirements of subsection (i) are met, and the added defendant 'knew or should have known' that it was an intended target of the Complaint, the 'mistake' criterion of subsection (ii) does not create a separate hurdle." Pet Br. 11.

At the outset, it is important to note that this argument, even if adopted, would not benefit Krupski. The argument retains the requirement in the rule that the newly-added defendant knew or should have known that it was an intended target. In this case, Costa Crociere knew that Krupski had repeatedly been informed that it was a proper defendant, but Krupski still did not bring a claim against it. Costa Crociere thus did not know or have reason to know that it was an intended target. Krupski thus loses even under her new theory of Rule 15(c).

Furthermore, Krupski's argument is deeply flawed and should not be adopted. The strongest support for her argument comes from a Fourth Circuit *en banc* decision, *Goodman v. Praxair, Inc.*, 494 F.3d 458 (4th Cir. 2007). In *Goodman*, the plaintiff sued Praxair Inc. and sought damages from it as successor in interest to another company, with whom the plaintiff had a contractual relationship. But in the complaint the plaintiff made clear that he was aware of another company, Praxair Services, Inc., which was the proper defendant.

Within the 120-day period for service, defendant Praxair, Inc. informed the plaintiff both that he had sued the wrong defendant and that the proper defendant was Praxair Services, Inc. Still within the 120-day period, the plaintiff filed an amended complaint adding Praxair Services, Inc. as a defendant. Thus, within the 120-day period of Rule 4(m), it was clear that (a) the plaintiff had made a mistake in identity, and (b) the newly added party was aware of that mistake.

The Fourth Circuit could easily have decided the case using the plain language of Rule 15(c). Under that plain language, the amended complaint would relate back, since it was clear to all within the period provided by Rule 4(m) that a mistake in identity had been made. But the Fourth Circuit failed to recognize that under the 1991 amendment to Rule 15(c) the relevant time for inquiry is the service period. Instead, the court repeatedly and incorrectly focused on whether there was a mistake during the limitations period.[6]

6. The *Goodman* court stated:

> "The 'mistake' language is textually limited to describing the notice that the new party had, requiring that the new party have expected or should have expected, *within the limitations period*, that it was meant to be named in the first place, although it also implies that the plaintiff in fact made a mistake." 191 F.3d at 471 (emphasis added).

> "When that party has been given fair notice of a claim *within the limitations period* and will suffer no improper prejudice in defending it, the liberal amendment policies of the Federal Rules favor relation-back." 191 F.3d at 471 (emphasis in original).

(Cont'd)

The Fourth Circuit's misunderstanding of the proper time for inquiry, and its desire to allow relation-back, led it to minimize the significance of the "mistake concerning identity" language and create a new interpretation of Rule 15(c). This interpretation stands alone among the circuits, and should not be adopted by this Court.

First, the plain language of Rule 15(c) includes the mistake requirement. It "unnecessarily muddies the water to treat [the mistake requirement] as inextricably intertwined with the questions of notice and prejudice under Rule 15(c)." *Woods v. Indiana University-Purdue University at Indianapolis*, 996 F.2d 880, 887 (7th Cir. 1993). *See also Rendall-Speranza v. Nassim*, 107 F.3d 913, 919 (D.C. Cir. 1997). The rule should be interpreted so that it provides meaning to all its terms. *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2235 (2009). "Mistake" must mean something more than what is already covered by other provisions.

(Cont'd)

> "[W]hen a person is provided notice *within the applicable limitations period* that he would have been named in the timely filed action but for a mistake, the good fortune of a mistake should not save him." 491 F.3d at 172 (emphasis added).
>
> "These core requirements preserve for a new party the protection of a statute of limitations. They assure that the new party had adequate notice *within the limitations period* and was not prejudiced by being added to the litigation." 491 F.3d at 170 (emphasis in original).

Second, there is no need for a radically new interpretation of Rule 15. Had the *Goodman* court properly read Rule 15(c), including the 1991 amendment, it would have allowed the claim against the new defendant to relate back.

Finally, any attempt to re-interpret the rule to further assist plaintiffs who fail to timely file claims may have unintended consequences. Courts have relied on the "mistake" requirement to preclude the relation back of "John Doe" claims brought by plaintiffs against unknown defendants. According to almost all the circuits, "a plaintiff's lack of knowledge of the intended defendant's identity is not a 'mistake concerning the identity of the proper party' within the meaning of Rule 15(c)(3)(B)." *Garrett v. Fleming*, 362 F.3d 692, 696 (10th Cir. 2004).[7]

The Fourth Circuit acknowledged this case law and that courts sometimes decide these John Doe cases based on the mistake provision. *Goodman*, 494 F.3d at 170. The court suggested that John Doe cases could be found to be outside of Rule 15(c) by virtue of the rule's

7. *Accord Molesko v. Correctional Services Corp.*, 229 F.3d 374, 383 (2d Cir. 2000), *rev'd on other grounds*, 534 U.S. 61 (2001); *Locklear v. Bergman & Beving AB*, 457 F.3d 363, 367 (4th Cir. 2006); *Jacobsen v. Osborne*, 133 F.3d 315, 320-21 (5th Cir. 1998); *Moore v. Tennessee*, 267 Fed.Appx 450, 455-56 (6th Cir. 2008); *Worthington v. Wilson*, 8 F.3d 1253, 1256-57 (7th Cir. 1993); *Fowlkes v. Ceurvorst*, 262 F.3d 687, 696 (8th Cir. 2001); *Wayne v. Jarvis*, 197 F.3d 1098, 1103 (11th Cir. 1999), *overruled on other grounds*, *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003). *But see Singletary v. Pennsylvania Department of Corrections*, 266 F.3d 186, 200-01 (3d Cir. 2001).

notice and prejudice provisions: "Most parties substituted for 'Doe' defendants would be protected against being added either because they were prejudiced or because they did not have proper notice." 494 F.3d at 470-71.

We suggest that the Fourth Circuit's confidence that the notice and prejudice provisions will protect against John Doe cases under Rule 15(c) is misplaced. John Doe cases often involve claims against government entities, where the plaintiff does not know the names of the specific police officers who encountered the plaintiff. In such cases, it seems entirely likely that where a lawsuit is filed against the government entity and Officer Does, the officers themselves will receive informal notice of the lawsuit, and it will be hard for them to establish prejudice. The bulwark against these John Doe claims thus remains the mistake provision of Rule 15(c). If it is interpreted as the *Goodman* court suggests, there may well be no limitation on John Doe claims.

Indeed, even the Fourth Circuit seemed to recognize this. After emphasizing the importance of the notice and prejudice requirements to guard against John Doe claims, the court added: "while parsing among different kinds of mistakes does not typically aid application of the Rule, naming Doe defendants self-evidently is no 'mistake' such that the Doe substitute has received proper notice." 494 F.3d at 471. But this afterthought is contrary to the court's stated intent of not "parsing among different kinds of mistakes." As even the Fourth Circuit acknowledged, the mistake provision plays an important role in Rule 15(c) and should not be ignored.

The *Goodman* case could have been decided the same way based on a proper reading of the relevant period of inquiry under Rule 15(c), and the decision fails to accord any real meaning to the mistake provision and will open the door to a flood of John Doe claims. It should not be adopted.

F. The burden of proof and standard of review favor affirmance

As explained, under the plain language of Rule 15(c) the district and circuit courts properly rejected Krupski's untimely claim against Costa Crociere. If the standard of review were *de novo*, affirmance would be required. But the standard of review is not plenary. In this case, the main question turns on whether Krupski's conduct was a deliberate choice or a mistake, and this inquiry is subject to a deferential standard of review, either abuse of discretion or clear error.[8] The district court's conclusion was neither an abuse of discretion nor clearly erroneous.

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8. Abuse of discretion: *VKK Corp. v. National Football League*, 244 F.3d 114, 127 (2d Cir. 2001); *Accolo v. Godiva*, 546 F.3d 788, 796 (7th Cir. 2008); *Popp Telecom v. American Sharecom*, 361 F.3d 482, 489-90 (8th Cir. 2004); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 5 F.3d 131, 134 (9th Cir. 1993); *Wayne v. Jarvis*, 197 F.3d 1098, 1102 (11th Cir. 1999), *overruled on other grounds*, *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003). *See generally Singleton v. American Express*, 400 F.3d 215, 226-27 (4th Cir. 2005).

Clear error: *Singletary v. Pennsylvania Department of Corrections*, 266 F.3d 186, 198 (3d Cir. 2001); *Parsons v. Greiff*, 148 F.3d 1223, 1225 (11th Cir. 1998).

But see Williams v. Boeing Co., 517 F.3d 1120, 1132 n.8 (9th Cir. 2008) (*de novo* review); *Garrett v. Fleming*, 362 F.3d 692, 695 (10th Cir. 2004) (application of undisputed facts to Rule 15(c) is reviewed *de novo*).

Finally, insofar as the record on appeal is lacking in specifics, that is further reason for affirmance. Costa Crociere raised the statute of limitations as a defense, and on its face the defense was valid—Krupski's claim was not filed within the limitations period. Krupski then raised the relation-back argument, and on this issue she had the burden of proof. *Soto v. Brooklyn Correctional Facility*, 80 F3d 34, 35 (2d Cir. 1996). Yet Krupski did not come forward with any sworn proof, but instead relied for the most part on argument of counsel, which is not evidence. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978). To the extent that the record is not complete, the incompleteness works against Krupski, and requires affirmance.

CONCLUSION

Krupski is not entitled to have her complaint relate back. During the relevant time she had abundant knowledge that Costa Crociere was a proper defendant, but she did nothing. Her failure to sue a clearly identified, known defendant was not a mistake but rather was a deliberate decision outside the scope of Rule 15(c). We respectfully request that the decision of the circuit court be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 09-337

In the Supreme Court of the United States

WANDA KRUPSKI, a single person,
Petitioner,

v.

COSTA CROCIERE, S.p.A.,
a foreign corporation (Italy),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTRODUCTION

This case turns on subsection **(ii)** of **Fed. R. Civ. P. 15 (c)(1)(C).** The outcome depends on whether, at any time before June 1, 2008, Respondent Costa Crociere "knew or should have known that the action would have been [initially] brought against it, but for a mistake concerning the proper party's identity".

Respondent's Brief ("Resp. Brief") offers no definition of "mistake concerning the proper party's identity" enabling it to prevail consistent with the language and purpose of **Rule 15.** Instead, it argues that Petitioner made a "deliberate choice" to sue the wrong party or forego recovery from the "proper party", and is disentitled to relation back.

The Rule forgives "mistake[s]" of all kinds. Relation back is not lost through blame or negligence. The term "deliberate choice" is not used in Rule 15. If relevant at all, "deliberate choice" describes the opposite of "mistake", an informed tactical choice to sue one defendant, or class of defendant, rather than another.

Petitioner did not intentionally sue the wrong defendant or jettison her cause of action against the proper party. The pre-suit notice documents and the Complaint make clear her intent to sue the "proper party", the vessel operator.

Respondent suggests that relation back is lost unless the added defendant is served with an amended complaint within 120 days of the initial suit. This suggestion misunderstands the reference to "the period provided by Rule 4(m) for serving the summons and

complaint". The 120 day period is the time frame for assessing whether the added defendant received timely notice of the suit and its intended involvement.[1]

The shortcomings of Respondent's "deliberate choice" theme are addressed in Arguments II and III Three subsidiary points are discussed in Argument I.

ARGUMENT

I. APART FROM RESPONDENT'S "DELIBERATE CHOICE" ARGUMENT, ITS REPLY BRIEF DOES NOT UNDERMINE THE CASE FOR RELATION BACK

A. The Meaning Of Rule 15(c)(1)(C) Is Informed By Its Remedial Purpose

Petitioner has pointed out the purpose underlying relation back under **Rule 15 (c)(1)(C)** (Pet. Brief, pp. 14-18): to enhance access to courts by overlooking errors which do not implicate limitation concerns of notice and prejudice. Respondent characterizes this as an attempt by Krupski to "thro[w] herself on the mercy of the Court" (Resp. Brief, p. 9), asking the Court to

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[1] **Rule 15(c)(1)(C)** requires, for relation back, that the added defendant (Costa Crociere) had notice "of the action [so] that it will not be prejudiced" and that "the action would have been brought against it, but for a mistake . . .". This notice to the added defendant must be "within the period provided by Rule (m)", 120 days. The Complaint against Costa Cruise was filed on February 1, 2008. Respondent calculates 120 days thereafter as June 2, 2008 (Resp. Brief, p. 19). The date of June 1, 2008 is used for simplicity.

"ignore the plain language of Rule 15 (c)" to avoid a "harsh" "result" (Resp. Brief, pp. 19-20). Krupski relies on the language of the Rule itself, particularly the unvarnished phrase, "mistake concerning the proper party's identity", which does not exclude any category of "mistake". The phrase should be interpreted in harmony with the intent behind the Rule. There is nothing remarkable about the proposition that interpretation of an enactment is informed by its intended purpose. ***SEC v. Zandford*, 535 U.S. 813, 819 (2002); *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3rd Cir. 2008); *United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997).**

B. Petitioner's Argument Is Not Tied To Relation Back Of "John Doe" Suits

Providing an overview of the interpretation of **Rule 15(c)(1)(C)** by District Courts and Circuit Courts, Petitioner noted the treatment of "John Doe" suits (Pet. Brief, pp. 31-32). Respondent argues that, if Krupski prevails, this will open the floodgates to "John Doe" suits (Resp. Brief, pp. 24-26). If **Rule 15(c)(1)(C)** is interpreted broadly enough to permit relation back in "John Doe" suits, it surely permits relation back here. However, rejection of "John Doe" amendments does not doom relation back in this case.

Many cases hold that a suit against "John Doe" does not relate back once an individual is identified. This view, aptly noted by Respondent, posits that, "a plaintiff's lack of knowledge of the intended defendant's identity is not a 'mistake concerning the proper party's identify'" [Resp. Brief, p. 24, citing ***Garrett v. Fleming*, 362 F.3d 692, 696 (10th Cir. 2004)].** Accepting that assumption, **Rule 15(c)(1)(C)**

would be decimated if both "lack of knowledge" and "knowledge" make relation back unavailable. If relation back is denied in "John Doe" suits for "lack of knowledge", it cannot also be withheld in cases involving "imputed knowledge" (Pet. Brief, p. 40).

C. Through Events Preceding June 1, 2008, Respondent "Received Such Notice of the Action That It Will Not Be Prejudiced In Defending On The Merits"

The courts below found that Petitioner satisfied subsection **(i)** of **Fed. R. Civ. P. 15 (c)(1)(C)** (Pet. Brief, pp. 20-23). Respondent offers no disagreement with that assessment. It is beyond dispute that, in a timely fashion, Respondent "received such notice of the action that it will not be prejudiced in defending on the merits". It received this "notice" through the pre-suit letter to its claims agent (JA 69 - JA 70)[2] and through the service of the initial suit - - well within "the period provided by Rule 4" - - on its agent, Costa Cruise,[3] represented by the same attorney as Respondent. Acknowledging that this information satisfies subsection **(i)** ("such notice of the action that it will not be prejudiced in defending on the merits"), Respondent denies that the same information satisfies **(ii)** ("knew or should have known that the action would have been

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[2] According to the Affidavit of Mr. Klutz, ¶ 2 (JA 33 - JA 34), his Company was retained by Costa Cruise to administer claims arising on Costa Crociere vessels.

[3] The Italian word for "cruise" is "crociera". "Costa Cruise" is both a separate entity serving as Respondent's agent and Respondent's own name in English.

brought against it, but for a mistake concerning the proper party's identity").

II. "DELIBERATE CHOICE" IS A SHORTHAND REFERENCE TO A PLAINTIFF'S INTENT THAT IS THE OPPOSITE OF "MISTAKE"

A. The Meaning Of "Mistake Concerning The Proper Party's Identity"

A variety of situations are commonly understood to constitute a "mistake concerning the proper party's identity" (Pet. Brief, pp. 26-30). Petitioner suggested a general definition, consistent with the breadth of the unlimited term "mistake", the purpose of **Rule 15(c)(1)(C)**, and the authorities permitting relation back where the other criteria of subsections **(i)** and **(ii)** are met (Pet. Brief, pp. 33-35). "Fault" is not inconsistent with the existence of a "mistake" (Pet. Brief, pp. 30-31). Suing the wrong defendant is, almost by definition, a "mistake" which could have been averted with sufficient diligence. The very existence of **Rule 15 (c)(1)(C)** allows forgiveness of preventable mistakes.

The meaning of "mistake" in **Rule 15** draws substance from different Rules. **Fed. R. App. P. 4(a)(5)(A)(ii)** permits extending the time for filing a notice of appeal for "excusable neglect or good cause". In contrast, **Rule 15** does not require an "excusable" error, emphasizing that fault does not disqualify an amendment from relation back.

Fed. R. App. P. 4(d) uses the term "mistakenly", treating as filed in the district court a notice of appeal

"mistakenly filed in the court of appeals". In this context, an error is forgiven even though there is some measure of "fault": the court rules, if read carefully, explain a "proper" filing.

The contrast between "mistake" and "intent" finds expression in **Fed. R. Civ. P. 9(b)**:

> "In alleging fraud or **mistake**, a party must state with particularity the circumstances constituting fraud or mistake. Malice, **intent**, knowledge, and other conditions of a person's mind may be alleged generally." (emphasis supplied).

Focusing on the term "proper party" also helps understand the meaning of "mistake". A "proper party" is a defendant, correctly named, whose actions give rise to the liability alleged. A "mistake" is "concerning the proper party's identity" if it "concerns" the "identity" of the defendant actually responsible. This leads to a working definition. A "mistake concerning the proper party's identity" occurs when the plaintiff intends to correctly name the entity with the status on which the suit is founded, but fails to do so.[4] In a case such as this, an amendment to correctly

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[4] The failure to sue the proper party initially may arise from a variety of causes falling within the broad term "mistake". An intended premises liability suit against the "123 Corporation" may, by transposition of digits, name the "321 Corporation". A product liability action may name "Ford Motor, Inc" instead of the actual name, "Ford Motor Company" A suit against a vessel operator may misidentify one corporate affiliate, Costa Cruise,

name the proper party satisfies the second clause of **Rule 15(c)(1)(C)(ii)** and relates back if the other requirements of subsections **(i)** and **(ii)** are satisfied (Pet. Brief, pp. 36-39).

B. "Deliberate Choice"

Without suggesting its own meaning of "mistake", Respondent argues that a "deliberate choice" is not one. To be sure, there is some level of intentionality so far removed from "mistake" that it is outside the scope of **Rule 15**. However, the dimensions of "deliberate choice" are far from clear.

Respondent employs multiple descriptions of the mindset it invokes: "conscious choice" not to sue Costa Crociere (Resp. Brief, pp. 7, 12), "foolish" "failure to sue Costa Crociere" (Resp. Brief, p. 8), "deliberate decision" (Resp. Brief, pp. 9, 11), "deliberate, conscious decision" (Resp. Brief, pp. 11, 14), "deliberate choice" (Resp. Brief, p. 14), "intentional choice" (Resp. Brief, p. 15). The cases cited in ***Lundy v. Adamar of New Jersey*, 34 F.3d 1173, 1183 (3rd Cir. 1994)** use different phrases to describe the non-mistake prohibiting relief: "deliberate choice between potential defendants", "not named . . . for tactical reasons", "deliberate choice".

Conceptually, there is a state of mind so different from "mistake" that relation back is unavailable. The

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rather than another, Costa Crociere. In each instance, the plaintiff intended to sue the responsible defendant but failed to do so, making a "mistake concerning the proper party's identity"

contours of that state of mind, "deliberate choice" for purposes of this Brief, are amorphous.

In deciding whether a plaintiff made a "mistake" or "deliberate choice" by identifying an entity other than the proper party in the initial Complaint, the plaintiff's mindset is gauged by the "knowledge" obtained before filing. ***Kilkenny v. Arco Marine, Inc.*, 800 F.2d 853, 856 (9th Cir. 1986)** ("our inquiry regarding the existence of a mistake of identity should be limited to [the] state of mind as of the time the initial complaint is filed"); ***Garvin v. Philadelphia*, 354 F.3d 215, 221-222 (3rd Cir. 2003)** (relation back unavailable, "if the plaintiff had been aware of the identity of the newly named parties when she filed her original complaint and simply chose not to sue them"); ***Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000).**

The cases use different formulations of the "knowledge" from which one might infer a "deliberate choice" rather than "mistake". ***Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998)** ("where the newly added defendants were known to the plaintiff before the running of the statute of limitations and where the potential defendants should not necessarily have known that, absent a mistake by the plaintiffs, they would have been sued"); ***Loveall v. Employer Health Servs., Inc.*, 196 F.R.D. 399, 403 (D.C. Kan. 2000)** ("with full knowledge of all potential defendants, a plaintiff's tactical decision to pursue a particular defendant in lieu of another"); ***Nelson v. Adams, U.S.A., Inc.*, 529 U.S. 460, 467, fn. 1 (2000)** ("it knew of Nelson's role and existence").

The District Court framed the issue as whether "the newly added defendant was known to the plaintiff

before the running of the statute of limitations" [19a, citing ***Powers*** and ***Chumney v. U.S. Repeating Arms Co.*, 196 F.R.D. 419 (D.C. Ala. 2000)**] (emphasis supplied). The Court relied on information provided **after** expiration of the one year period (19a), concluding that, "This is not a case where there was a lack of knowledge of the existence of the proper party or the identity of the proper party" (20a). The Circuit Court took a different tack, relying on the pre-suit "identity and knowledge of Costa Crociere as a potential party" that was "imputed to Krupski" because it "was clearly identified in the ticket's definition of 'Carrier' " (6a).

Respondent has cited no other case going as far as the "imputed" "knowledge" approach of the Eleventh Circuit. In ***Williams v. Doyle*, 494 F. Supp. 2d 1019, 1030 (W.D. Wisc. 2007)**, the Court explained the flaw in that approach:

> ". . . [T]he best interpretation of this statement is that a party may not use *Rule 15(c)(3)* if it makes a strategic decision, or 'chooses' not to sue a particular party. It cannot mean simply that a plaintiff is prohibited from adding a party if it was previously aware of that party. This would make the rule a virtual nullity. . . .".

The divergent views show the inability to clearly define, or identify the evidence necessary to show, a "deliberate choice" outside the phrase, "mistake concerning the proper party's identity". The cases relied on by Respondent do not fit the characteristics of this case: amendment to change the name from one corporation to that of a similar-sounding affiliate which is the actual entity occupying the status (vessel

operator) on which the suit was based from the outset, permitting relation back (Pet. Brief, pp. 36-39).

Respondent invokes ***Ish Yerushalayim v. United States Dep't Of Corrections*, 374 F.3d 89 (2nd Cir. 2004)** and ***Nelson*** (Resp. Brief, pp. 12, 14-15, 17). In each, the initial suit was filed against an institutional defendant, sued on a theory of institutional liability. The proposed amendment would add an individual defendant, alleging that this individual was personally liable.[5] Quite reasonably, the courts could conclude that there was no "mistake" in the initial filing. The intended target from the outset was the institution, not the individual. There was no misunderstanding of the individual's actual name, and there could be no plausible misapprehension that the individual occupied the institutional status on which the suit was based.

C. The Interplay Between "Deliberate Choice" And "Mistake Concerning The Proper Party's Identity"

Rule 15(c)(1)(C) makes no reference to "deliberate choice" or anything similar. If the "mistake" standard is met, relation back is allowed. Thus, "deliberate choice" has no foundation in the language of the Rule, and is best understood as a rough description of intentionality that is not a "mistake concerning the proper party's identity". The notions loosely

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[5] As another rationale for the outcome, omission of the individual from the original Complaint may have been a considered tactical decision. Litigators commonly believe that jurors return higher damage awards against institutional defendants

characterized as "deliberate choice" are not a talismanic incantation to ward off relation back. They are linguistic shorthand for arguing that a "mistake concerning the proper party's identity" did not in fact occur.

Similarly, "knowledge" is simply a fact from which, under proper circumstances, one might infer the absence of "mistake". It is a form of possible circumstantial evidence, not a proxy for the critical inquiry: whether there was a "mistake concerning the proper party's identity".

The term "knowledge" is an over-broad substitute for serious analysis. Does one have "knowledge" of a fact learned in elementary school, buried in the recesses of the mind? Having read the Bible once, does one "know" the content of every verse and grasp its theological significance? Is a shortcoming in recall, or memory, or information processing, anything other than a "mistake"? As these questions reflect, "knowledge" can be a matter of nuance or degree. Reading something in the past does not inherently equate to current "knowledge".

Petitioner suggests that a "mistake concerning the proper party's identity" occurs where the plaintiff intended to sue the "proper party" whose status gives rise to the liability asserted (the vessel operator), but identified the defendant in a way that failed to accomplish this purpose. This is a "mistake", not a "deliberate choice", and the amendment relates back.

III. THE DOCUMENTARY EVIDENCE AND SURROUNDING CIRCUMSTANCES SHOW A "MISTAKE CONCERNING THE PROPER PARTY'S IDENTITY"

For its thesis that it was a "deliberate choice" rather than a "mistake" for Krupski's counsel to sue Costa Cruise, Respondent stresses the ticket's mention of Costa Crociere within the definition of "carrier". It castigates Petitioner's counsel for not having sued Costa Crociere initially in view of the ticket. Seemingly conceding that "relation back" would apply if sought before June 1, 2008 (Resp. Brief, pp. 8, 16-19), Respondent notes that the Motion to Amend was filed shortly after that date. Costa Crociere apparently regards these two factors alone - - the content of the ticket and motion to amend after June 1, 2008 - - as establishing that it did not "[know] or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity" .

A. The Issue Entails No Deferential Standard Of Review

Recognizing disagreement over the standard of review, Costa Crociere urges deference to the "district court's conclusion" (Resp. Brief, p. 26). It suggests that affirmance is in order because "Krupski did not come forward with any sworn proof" (*Id.*, p. 27).

It is not clear whether Respondent implies that every relation back dispute requires an evidentiary hearing. Or whether, if an evidentiary hearing is required for informed decision on a summary judgment motion, the non-movant bears the brunt of a trial

court's failure to conduct one. Considerations of judicial economy and the wise use of judicial resources disfavor formal subsidiary litigation over relation back.

It is true that Krupski did not present "sworn" proof. Nor, for that matter, did Respondent. Petitioner did present her counsel's explanation, the documentary evidence showing efforts to identify the "Costa" company doing business in Florida (JA 56 - JA 68), counsel's notice letter to "Costa Cruise" reflecting his belief that this was the responsible entity (JA 69 - JA 70), and the response of the "Claims Administrator for Costa Cruise", sent from Florida, "[i]n order to facilitate our future attempt to achieve a pre-litigation settlement" (23 a - 24a). The Complaint (RE 1, JA 21 - JA 27) was on file, alleging "Costa Cruise" as the name of the responsible vessel operator. This documentary evidence was, and is, sufficient to permit deciding the relation back question.

Moreover, "deference" to the District Court would not avail Respondent. The District Court placed no reliance on the ticket, instead considering only the "notice" provided to Krupski after the one-year limitation period had already expired (19a). The District Court dismissed on the basis that, "whether a plaintiff made a 'mistake', rather than a conscious choice, in originally omitting the relevant defendant turns on whether the newly added defendant was known to the plaintiff **before the running of the statute of limitations**" (19a, emphasis supplied). "Deferring" to that analysis, Petitioner's case would be considerably **easier**. Information gained **after** the expiration of the limitations period does not suffice under a legal standard requiring knowledge "before the running of the statute of limitations".

Generally, whether a case involves a "mistake concerning the proper party's identity" presents a mixed question of law and fact. The outcome is driven by the legal question of what constitutes such a "mistake". Only after identifying what, legally, constitutes a "mistake concerning the proper party's identity", can one determine whether a "mistake" of that nature occurred. The overriding issue of law - - the meaning of the "mistake" clause - - presents a legal question subject to *de novo* review.

When a testimonial hearing is held, involving the opportunity to observe the demeanor of witnesses, there might be reason to defer to trial court fact-finding. Here, the District Court entertained no testimony. The Circuit Court and this Court have available the same documentary evidence presented to the District Court.

This case involves first discerning the legal meaning of **Fed. R. Civ. P. 15 (c)(1)(C)(ii)**, then applying that legal standard to the documents of record. This Court's ability to do so is not affected by a possible deferential standard of review in other cases.

B. The "Imputed" "Knowledge" Provided By The Ticket Does Not Create A "Deliberate Choice" Rather That A "Mistake"

Respondent heralds the name "Costa Crociere" among the many members of the "CARRIER" class mentioned in the "DEFINITIONS" section of the ticket (27a). It is unclear whether Respondent contends that the fault of counsel proves the absence of "mistake" or

whether it offers the ticket as circumstantial evidence of a "deliberate choice" to sue the wrong party.

Relation back is not restricted to blameless plaintiffs. The very notion of "mistake" embraces preventable errors. For example, the filing of a Complaint with transposed numbers (see fn. 4, *supra*) could be prevented with perfect proofreading. Review of corporate records would identify the automaker as Ford Motor Company rather than Ford Motor, Inc. (see fn. 4). Virtually always, the plaintiff's counsel could be criticized for failing to correctly identify the intended defendant initially. The fact that Plaintiff's counsel failed to discern from the definition of "CARRIER" that Costa Crociere was the name of the vessel operator is a mistake of debatable blameworthiness. Yet that is what **Rule 15(c)(1)(C)** is designed to forgive. The insight of ***Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000)** bears repeating:

> "[T]he language of Rule 15(c)(3) does not distinguish among types of mistakes concerning identity. Properly construed, the rule encompasses both mistakes that were easily avoidable and those which were serendipitous."

Use of the "CARRIER" definition as evidence of a "deliberate choice" to sue the wrong party fares no better. Neither lower court directly found that Krupski sued the wrong party on purpose. The "knowledge" identified by the Eleventh Circuit was "imputed", the definition of "CARRIER" providing Petitioner's counsel with information enabling him to identify Costa Crociere as the vessel operator. That approach confuses "imputed knowledge" (more

accurately, constructive notice) with a deliberate choice.[6]

The ticket may have provided the means necessary to avoid the mistake, but it does not change a "mistake" (the erroneous designation of a defendant other than the intended target) into a "deliberate choice" to sue the wrong party, knowing that it has no responsibility. The facile leap from "imputed knowledge" to "deliberate choice", and the failure to recognize the nuanced continuum between notice and knowledge, lie at the heart of the lower court's error.

Intuitively, one cannot believe that, for no apparent reason, Krupski's counsel imperiled his client's rights by suing Costa Cruise, and omitting Costa Crociere, as a "deliberate choice", knowing that he was suing, as vessel operator, an entity that was not. It is far more likely that the error is attributable to a "mistake" - - the failure to carefully read the ticket, or appreciate the meaning of Costa Crociere's inclusion in the "CARRIER" definition, or reliance on the prominent reference to Costa Cruise as a "cruise company" in the ticket documents (25a), and the letter from Respondent's agent, Mr. Klutz (23a - 24a).

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[6] The two clauses of sub-rule **(ii)** address the state of mind of two different parties, with two different standards of mentation. For an **added defendant**, the Rule looks to **constructive knowledge or notice**, "knew or should have known that the action would have been brought against it . . .". For the **plaintiff** seeking amendment, the second clause considers whether the omission resulted from a "**mistake** concerning the proper party's identity". While the confusion is understandable, it is inaccurate to apply a constructive notice approach to the plaintiff, whose intent is measured by "mistake".

As "circumstantial evidence", the ticket content has no tendency to favor the "deliberate choice" conjecture over the "mistake" explanation. It no more proves "deliberate choice" here than it would in any other case where information about the "proper party" was available pre-suit.

To follow Respondent's argument, whenever information existed permitting identification of the "proper party", that information would, standing alone, prove a "deliberate choice" to sue the wrong party. Thus, the very existence of a "mistake" (in failing to correctly find, digest, and use the available information) would foreclose relation back under a Rule **allowing** relation back for a "mistake concerning the proper party's identity".

"Blameworthiness" does not disentitle a party to relation back. Neither is it barred by the notion that "imputed knowledge" constitutes "deliberate choice".

C. Delay In Filing The Amended Complaint Does Not Render The Initial Suit A "Deliberate Choice" Rather Than A "Mistake"

Respondent points to the litigation information provided by Costa Cruise, beginning with the Answer (RE 6; JA 29 - JA 31), filed more than one year after the injury. It argues that, because Petitioner did not file her Motion for Leave to Amend until more than 120 days after the initial Complaint was filed (RE 1, JA 21 - JA 27), this proves that her failure to sue Costa Crociere initially was a "deliberate choice" rather than

a "mistake' (Resp. Brief, pp. 7-8, 13-15, 16-19).[7] It seemingly admits that a Motion to Amend filed before June 1, 2008 would permit relation back.

The meaning of the 120 day period referred to (". . . within the period provided by Rule 4(m) . . .") warrants discussion. In ***Schiavone v. Fortune*, 477 U.S. 21 (1986),** this Court held that the earlier version of **Rule 15** required notice to the added Defendant within the limitation period itself. Since the initial defendant might not receive notice until 120 days after filing (the time for service of the Complaint), ***Schiavone*** had an anomalous effect. It meant that notice to an added defendant (by the end of the limitation period) had to be accomplished before notice to the original defendant (up to 120 days after filing). The disparity was illogical since subsection **(i)** anticipates that notice to the initial defendant could provide the added defendant with "such notice of the action that it will not be prejudiced in defending on the merits", especially where the two are affiliates represented by the same counsel (Pet. Brief, pp. 20-23).

The post-***Schiavone*** amendment corrects the disparity. It looks to the "notice" available to the added defendant ("such notice of the action that it will not be prejudiced"; "knew or should have known that the action would have been brought against it") for up to 120 days after the initial Complaint ["within the period provided by Rule 4(m) for serving the summons"].

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[7] Respondent offers no explanation why, if Petitioner truly made a "deliberate choice" not to sue Costa Crociere initially, she had a sudden change of heart.

This reference to the **Rule 4(m)** period does **not** dictate a deadline for filing an amended complaint. **Fed. R. Civ. P. 15 (b)** allows an amendment at any time with judicial permission. If amendment is allowed, the service period is 120 days **from the amendment**, or an extended time authorized by the court, **Fed. R. Civ. P. 4(m)**.[8]

If Respondent contends that the filing or service of the Amended Complaint occurred beyond a legal deadline, it is wrong. The amendment was sought and obtained, and the Amended Complaint was filed and served, in accord with all applicable Rules (Pet. Brief, p. 43).

The idea that an amendment can only relate back if sought, filed, and served within 120 days of the initial filing has no basis in **Rule 15** or any other body of law. Creation of that requirement would be practically unworkable.

With the time for serving the initial complaint, then a responsive pleading (perhaps after a stipulated extension), often a **Rule 12(b)** motion rather than an Answer, then eventually an Answer which may not identify the "proper party", the later filing of a motion to amend, securing a hearing date on the motion, obtaining a ruling, then preparing, filing and serving an amended complaint, the added defendant is often not served within four months of the initial Complaint.

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[8] Since the Amended Complaint was served on Costa Crociere in Italy pursuant to the Hague Convention in accord with **Rule 4(f)(1)**, even the 120 day limit is inapplicable since the final sentence of **Rule 4(m)** states, "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) . . .".

With good reason the Rules permit an amendment to relate back if the criteria of **Rule 15(c)(1)(C)(i)** and **(ii)** are met, regardless of whether the amendment is more than four months into the suit.[9]

It is true that the reference to **Rule 4(m)** permits consideration of events up to 120 days after filing of the Complaint. However, that period is not a deadline for filing the amendment. It is, instead, the reference point for assessing the added defendant's notice.[10]

Here, Ms. Krupski relies exclusively on events occurring before June 1, 2008. Before that date, she sent the notice letter to Costa Cruise and received the letter from Mr. Klutz. After reviewing official records to identify the Costa entity doing business in Florida, Petitioner filed her Complaint, alleging negligence by the vessel operator, and served it on Respondent's

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[9] Respondent criticizes Petitioner for filing against Costa Cruise "just before the end of the limitation period", "on the eve of the running of the limitation period" (Resp. Brief, pp. 2, 3). Ironically, if she had waited until the end of the one year limitation period, suing Costa Cruise on February 21, 2008, the anniversary of her injury, her Motion to Amend filed on June 13th would be within 120 days of the initial Complaint.

[10] ***Kilkenny*** indicates that delay in amendment may bear on the first clause of **(ii)**, if the added defendant lacked reason to know that it was an intended target. That reasoning is flawed. If, at any time in the 120 day period, the added defendant "knew or should have known that suit would have been brought against it", the Rule's requirements are met. This is so regardless of what happened or didn't happen later or whether there was also reason to think otherwise. In all events, in this case the notice letter and allegations against the vessel operator in the Complaint provided Respondent with ample reason to know that, as the shipowner, it was the intended defendant.

affiliated agent, which was defended by Mr. Horr, the attorney for Costa Crociere. It is these events, occurring before June 1st, from which, Ms. Krupski argued, Costa Crociere, "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity". If Petitioner is correct on this point, Petitioner has met the **Rule 15** standard.

Consider Respondent's apparent concession that, if Petitioner had sought amendment before June 1, 2008, she would have been entitled to relation back under **Rule 15(c)(1)(C)(ii)**. If so,[11] it would be because she established, at that time, that Costa Crociere "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity". And, if Costa Crociere had reason to know before June 1, 2008 that it was the intended target, that knowledge did not magically evaporate afterward. If the relation back standards of **Rule 15(c)(1)(C)(i)** and **(ii)** were met at any time before June 1, 2008, they remained met when Petitioner filed her Amended Complaint.

Once the one year limitation period expired on February 21, 2008, the maintainability of suit against Costa Crociere depended on "relation back". Regardless of when the suit was amended, by June 1, 2008 Respondent had reason to know "that the action would have been brought against it, but for a mistake". The date of amendment has nothing to do with

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[11] Conversely, if there was truly no "mistake concerning the proper party's identity", then Petitioner would not have been entitled to relation back of an amendment filed before June 1, 2008.

whether the **Rule 15** criteria regarding constructive notice to the added defendant were met "within the period provided by Rule 4(m) for serving the summons and complaint".

D. The Initial Suit Against Costa Cruise Was A "Mistake" Rather Than A "Deliberate Choice" To Sue The Wrong Party

It defies rationality that Plaintiff, alleging liability of the ship operator, intentionally sued an entity known to have no liability, foregoing suit against the known proper party. Without compelling motivation to vex an innocent defendant, or ignore the only possible source of recovery, it makes no sense to assume that suing the wrong party was anything but a "mistake".

Respondent offers no direct evidence to support its "deliberate choice" contention. Its "pre-suit ticket" analysis does not favor the theory that Krupski's counsel deliberately sued the wrong party over the explanation that he mistakenly failed to carefully read the "DEFINITION" section of the ticket or deduce that the naming of Costa Crociere as one member of the "CARRIER" class meant that it (but no other defined "CARRIER") was the vessel operator. Information obtained by Petitioner from the litigation filings of Costa Cruise, after the limitation period had expired, adds nothing to deciding whether the initial filing, without benefit of that information, was a "mistake". The outcome is not altered by "delay" in seeking amendment, since once the anniversary of the injury passed, the ability to add Respondent depended on relation back and the events that already transpired.

Nothing in the record points legally or factually to the conclusion that Petitioner made a "deliberate choice" to sue Costa Cruise, rather than the proper party.

In contrast, the record is replete with facts pointing only to the conclusion that Petitioner harbored a "mistake concerning the proper party's identity". The ticket documents on which Respondent relies prominently identified "Costa Cruise", a "cruise company", with the vessel (25a). The documents were sent by Costa Cruise (Klutz Affidavit, ¶ 14; JA 36). The official records identify Costa Cruise, rather than Costa Crociere, doing business in Florida (JA 56 - JA 68). These facts explain how the mistake was made, lending support to the explanation that a "mistake concerning the proper party's identity" occurred.

More telling is the pre-suit letter (JA 69 - JA 70). That document reflects counsel's mistaken belief that the addressee, Costa Cruise, was responsible for the onboard injury. It stands as potent pre-suit proof of the "mistake concerning the proper party's identity" harbored by Petitioner's counsel.

The most probative indicator is the initial Complaint. That filing bespeaks the intent to obtain relief from the "proper party", the vessel operator. It also expresses the mistaken belief that "Costa Cruise" was the name of the operator.

This case involves a suit against an intended "proper party": the vessel operator. The initial Complaint misidentified the name of the proper party, Costa Cruise rather than Costa Crociere. The overwhelming weight of authority recognizes that this constitutes a "mistake concerning the proper party's

identity" as that phrase is used in **Fed. R. Civ. P. 15(c)(1)(C)** (see cases cited at Pet. Brief, pp. 36-39). This Court should adopt the same meaning of that phrase, and reach the same "relation back" outcome.

CONCLUSION

This Court should reverse the decisions of the Court of Appeals for the Eleventh Circuit and the District Court. The case should be remanded to the District Court for further proceedings.

Respectfully submitted,

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